



December 2, 2004

BY ELECTRONIC FILING

Marlene Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: WT Docket No. 02-55
Comment

Dear Ms. Dortch:

Preferred Communication Systems, Inc. ("Preferred") hereby requests that this Comment be associated with WT Docket 02-55, *Improving Public Safety Communications in the 800 MHz Band*.

On October 22, 2004, the Federal Communications Commission ("FCC" or "Commission") released a Public Notice in which it sought comments from interested parties concerning requests for clarification filed by Nextel Communications, Inc. and certain other parties following the FCC's release of its Report and Order in the above referenced proceeding.¹ Preferred is submitting the attached documents both as its Comment in response to these ex parte filings and its first request for clarifications to the Report and Order that other participants in this proceeding have failed to raise.

Pursuant to the Public Notice Preferred is forwarding both to you and Mr. Roberto Mussenden, Wireless Telecommunications Bureau, Public Safety and Private Wireless Division a copy of this Comment by electronic mail.

Sincerely,

/s/Charles M. Austin
Charles M. Austin

¹ Public Notice, *Commission Seeks Comment On Ex Parte Presentations And Extends Certain deadlines Regarding The 800 MHz Public Safety Interference Proceeding WT Docket No. 02-55*, October 22, 2004.

Attachments

cc: Roberto Mussenden, Wireless Telecommunications Bureau, Public Safety and Private Wireless Division

Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Jonathan S. Adelstein
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
John A. Rogovin, Chief Counsel
Edmond J. Thomas, Chief Engineer, Office of Engineering and Technology
Jennifer A. Manner, Senior Counsel to Commissioner Abernathy
R. Paul Margie, Legal Advisor to Commissioner Copps
Samuel L. Feder, Legal Advisor to Commissioner Martin
Barry Ohlson, Senior Legal Advisor to Commissioner Adelstein
John B. Muleta, Chief, Wireless Telecommunications Bureau
Michael J. Wilhelm, Deputy Chief, Public Safety and Critical Infrastructure Division of the Wireless Telecommunications Bureau

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)	
)	
Improving Public Safety Communications)	
In the 800 MHz Band)	WT Docket No. 02-55
)	
Consolidating the 800 and 900 MHz Industrial/ Land Transportation and Business Pool Channels)	
To Allocate Spectrum Below 3 GHz for Mobile And Fixed Services to Support the introduction of New Advanced Wireless Services, including)	
Third Generation Wireless Services)	ET Docket No. 00-258
)	
Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service)	RM-9498
)	
Petition for Rule Making of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service)	RM-10024
)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by The Mobile Satellite Service)	ET Docket No. 95-18

To: The Commission

COMMENT

Preferred Communication Systems, Inc. ("Preferred") hereby responds to the ex parte requests for clarification filed by Nextel Communications, Inc.¹ and certain other participants² in the WT 02-55 proceeding to the Federal Communications Commission's

¹ See Nextel Communications, Inc., Ex Parte Presentation, July 27, 2004; Nextel Communications, Inc., Ex Parte Presentation, September 16, 2004; Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004; Nextel Communications, Inc., Ex Parte Communications, Inc., September 23, 2004; Nextel Communications, Inc., September 28, 2004; Nextel Communications, Inc., and October 1, 2004 (collectively referred to hereafter as "*Nextel Requests for Clarification*").

² See n. 4 to the Commission's October 22, 2004 Public Notice. See also Mobile Relay Associates and Skitronics, LLC's Ex Parte Presentation, October 8, 2004.

Report and Order.³ To respond fully to these requests for clarification, Preferred found it necessary to address certain issues not raised in these filings and to request clarification by the FCC of other issues these parties failed to address.

³ *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion Report and Order, WT Docket No. 02-55, 19 FCC Rcd 14969 (“*Report and Order*”).

EXECUTIVE SUMMARY

- 800 MHz Band Movement
 - The *Report and Order*'s impermissible discriminatory treatment of Non-Nextel EA and Cellular-Architecture System EA- and Site-Licensed Spectrum violates the Due Process, Equal Protection and Takings Clauses of the Fifth Amendment to the U.S. Constitution and the Commission's statutory mandates to maintain regulatory parity and promote competition among ESMR licensees and between such licensees and cellular and PCS licensees.
 - The Commission should reaffirm that all General Category and Lower 80 EA licensees will be afforded the three-part election set forth in paragraph 162 of the *Report and Order* concerning the movement of their respective EA authorizations.
 - The FCC should reaffirm that all Cellular-Architecture System Site licensees will be afforded the three-part election set forth in paragraph 162 of the *Report and Order* concerning the movement of their respective Site licenses.
 - The Commission should clarify that a SMR Site licensee will be afforded such three-part election if it has obtained a firm commitment to purchase the infrastructure equipment for a Cellular-Architecture System within nine (9) months following the date the Second Report and Order (reflecting all clarifications and modifications to the *Report and Order*) is published in the Federal Register.
 - The FCC should reaffirm that EA and Site Licensees will be allowed to move Site Channels into the Cellular Block on an EA market wide Clean 1:1 basis if such Channels are included in a Cellular-Architecture System as of the present construction deadline for Site Channels held by Nextel, Nextel Partners, or a licensee who has executed a management or purchase option agreement with Nextel ("Nextel Control Group" or "NCG")(December 20, 2005).
 - Given the considerable spectral benefits provided to the Nextel Control Group in the 800 and 900 MHz Bands and the 1.9 GHz Band and the crediting to Nextel and presumably Nextel Partners of their respective capital expenditures incurred to add cell sites to maintain their respective present operating systems' capacity toward Nextel's total contribution of \$4.86 billion, and the uncertainty created, and impermissible results caused, by the *pro rata* distribution approach set forth in paragraph 168 and footnote 444 of the *Report and Order*, the Commission expressly should eliminate such approach.
 - Alternatively, the FCC should clarify that the *pro rata* distribution approach set forth in paragraph 168 and footnote 444 of the *Report and Order* will be

restricted to the unique 800 MHz licensing situation found in Southern Communications Services, Inc.'s core EA markets (Georgia, Alabama, southeastern Mississippi and northern Florida).

- The Commission should clarify that a Cellular-Architecture System licensee's Upper 200 Site Channels are entitled to remain in the Upper 200 Channels and thereby become EA-Licensed Spectrum.
- The FCC should clarify that if a Non-Nextel or Cellular-Architecture System licensee elects to move its EA- and qualifying Site-Licensed Spectrum to the new Cellular Block, it further may elect to move its
 - (1) General Category EA- and Site-Licensed Spectrum to the thirty (30) Channels at the top of the Upper 200 Channels (Channels 571-600), if held by Nextel or Nextel Partners, and available to be vacated, and the former NPSPAC Channels (821-824 MHz/866-869 MHz) on an EA market, Clean and 1:1 basis; if the top of the Upper 200 Channels is not held by Nextel or Nextel Partners, as is the case in the Puerto Rico EA market, the Non-Nextel EA licensee alternatively could elect to relocate up to thirty (30) of its General Category EA and/or Site Channels to the 1.9 GHz Band on an EA market, Clean and 1:1 basis.
 - (2) Lower 80 EA- and Site-Licensed Spectrum either to the top of the Upper 200 Channels and moving downward or to the 1.9 GHz Band spectrum on an EA market, Clean and 1:1 basis.
- Except for Site Channels held by EA and Cellular-Architecture System licensees, the Commission should clarify that all Site Channels that
 - (1) presently are within the new Cellular Block, or
 - (2) are moved into the new Cellular Block pursuant to the election set forth in paragraph 162 of the *Report and Order* and paragraph 163 therein and
 - (3) qualify to be treated as EA-Licensed Spectrum as set forth in paragraph 163 of the *Report and Order*,

would be relocated to the Non-Cellular Block on a geographic "footprint" basis as follows:

- (1) Initially, such Site Channels will be moved to the Guard Band;
- (2) If the Guard Band is insufficient to accommodate the Site Channels required to be relocated from the Upper 200 Channels in a particular EA market, then the excess Site Channels would be relocated to the Expansion Band; and
- (3) If the Expansion Band is insufficient to accommodate the remaining Site Channels that are required to be relocated from the Upper 200 Channels in

a particular EA market, then the excess Site Channels will be moved to the top of the Non-Cellular Block and move downward.

Site Channels required to be moved from the Upper 200 Channels will be relocated on a geographic “footprint” basis only.⁴

- The Commission should recognize that, much like Southern Communications Services, Inc.’s core markets, the Puerto Rico EA market presents an unusual licensing situation that should be addressed separately from the remaining EA markets. Since Nextel failed to win the A and C Frequency Blocks in FCC Auction #16 in this EA market, movement of Preferred’s EA- and Site-Licensed Spectrum to the Upper 200 Channels as proposed in the *Report and Order* would result in the loss of numerous Channels in violation of the Due Process, Equal Protection and Takings Clauses of the Fifth Amendment to the U.S. Constitution.
 - The FCC should reject Nextel’s proposed clarifications to the *Report and Order* that would leave 800 MHz SMR, BILT and Public Safety Site licensees in Channels 121-150 and move Non-ESMR licensees’ General Category EA Authorizations comprising Channels 1-120 to “comparable” channels below 861.4 MHz.
- Allocation of 1.9 GHz Band Spectrum
 - The Federal Communications Commission (“FCC” or “Commission”) clearly lacks the statutory authority to allocate either a nationwide 10 MHz license in the 1.9 GHz Band or multiple 1.9 GHz Band licenses based upon the one hundred seventy-five (175) EA markets exclusively to Nextel and Nextel Partners. Such spectrum award would violate the mandatorily applicable competitive bidding provisions of Section 309 of the Communications Act and the FCC’s statutory mandates to maintain regulatory parity and promote diversity of license ownership and competition under Sections 332(c), 309 and 257 of the Communications Act.

⁴ The relocation rules with respect to Site Channels in the Upper 200 Channels also would apply to EA Authorizations not constructed as part of a Cellular-Architecture System within seven (7) years from the license issuance date. To expedite rebanding in EA markets in which Preferred Communication Systems, Inc. holds EA Authorizations, it would forego reimbursement of its relocation costs and pay the total 800 MHz and pro rata 1.9 GHz band relocation costs in exchange for the award of 10 MHz of 1.9 GHz band spectrum in those EA markets. In the Puerto Rico EA market, Preferred also would commit to pay Nextel’s relocation costs involving its B Frequency Block EA Authorization and Site Channels in the Upper 200 Channels to the Interleave Channels in that EA market. Preferred would seek to complete the rebanding process in these EA markets within thirty-six (36) months, or several years before the schedule proposed in the Report and Order and proposed by Nextel.

- Lacking the discretion to allocate the 1.9 GHz Band spectrum exclusively to Nextel and Nextel Partners, a reviewing court clearly would reverse the FCC's determination.
- The allocation of 1.9 GHz Band spectrum exclusively to Nextel and Nextel Partners clearly would involve the issuance of an "initial" license under the standard enunciated in the *Fresno Mobile Radio* decision, the Commission's own rules and the standard announced by the FCC in the Competitive Bidding Second Report and Order. Having already allocated the 1.9 GHz Band spectrum for commercial services, recent Commission decisions that avoid mutual exclusivity by limiting eligibility to participate in the award of spectrum are inapplicable.
- Section 309(j)(6)(E) provides no authority for a private sale of spectrum to Nextel and Nextel Partners. That Section admonishes the FCC to consider "engineering solutions, threshold qualifications, service regulations and other means" to avoid mutual exclusivity when it accommodate the needs of all of the members of a class of licensees. By separating the award of 1.9 GHz Band spectrum from the movement of 800 MHz Band General Category and Lower 80 EA- and Site-Licensed and BILT Site Channels converted to CMRS, the Report and Order renders this Section inapplicable.
- The FCC should clarify that Nextel Partners, Inc. receives an allocation of 10 MHz of 1.9 GHz band spectrum in the seventy-one (71) EA markets in which it, rather than Nextel, holds 800 MHz band spectrum.
- The Commission should clarify that it is issuing multiple 1.9 GHz band licenses to Nextel Communications, Inc. and Nextel Partners, Inc. according to the one hundred seventy-five (175) EA markets.
- The FCC should clarify that Nextel Partners, Inc. is not contributing any funds toward defraying 800 MHz band relocation costs.
- The Commission should clarify that Nextel is receiving credit for the value of 800 MHz Band spectrum to be vacated by Nextel Partners.
- The FCC should clarify the *Report and Order* to allow Nextel to
 - (1) utilize multiple letters of credit;
 - (2) pay relocation expenses directly; and
 - (3) receive credit for its capital expenditures and those of Nextel Partners' incurred to add cell sites to maintain their respective operating systems' capacity.
- The Commission should clarify the *Report and Order* by explicitly recognizing that a minimum of 5.5-6.5 MHz of 1.9 GHz band spectrum is

integral to any 800 MHz rebanding proposal (1) moving EA-Licensed Spectrum from the underlying Site- Licensed Spectrum held by EA licensees on a 1:1 Clean basis to the new Cellular Block and separating such Spectrum from the Site-Licensed Spectrum held by Non-EA licensees and (2) protecting fully the spectrum rights of all General Category and Lower 80 EA licensees. Unlike the Consensus Parties' Proposal, such an alternative proposal necessarily would open up participation in the allocation of such 1.9 GHz Band spectrum to all such licensees.

- The Commission should clarify the *Report and Order* by adopting a proposal that provides that all General Category and Lower 80 EA licensees who (1) forego reimbursement of their own relocation costs, and/or (2) promise to contribute funds to defray total relocation costs and/or, (3) in certain EA markets, lose 800 MHz frequencies, would be entitled to an allocation of additional 1.9 GHz band spectrum.
- Preferred is willing to forego reimbursement of its own relocation costs, contribute up to \$150 million to defray total relocation costs, and give up some 800 MHz frequencies in the Puerto Rico EA market. In exchange, Preferred would receive 8 MHz of 1.9 GHz spectrum in the Puerto Rico EA market and 6 MHz of such spectrum in each of its other EA markets and certain other EA markets.
- If Nextel refuses to accept the only rebanding proposal for which the Commission has the legal authority to adopt, Preferred believes that the Commission should adopt such Improvements and fund the 800 MHz band relocation including that of Nextel from the alternative funding sources set forth in this Comment.

- Funding

- The FCC should seek amendment of the Communications Act to grant it the authority to impose a license renewal fee of \$.15 per MHz/Pop on cellular licensees who originally obtained their respective licenses by a comparative hearing or random selection lottery procedure and/or have acquired their licenses from such licensees. Such renewal fees are estimated to raise \$2.19 billion over the next five (5) years. The amendment would allow the Commission to apply such fees toward payment of 800 MHz Band reconfiguration costs and to assist Public Safety and CII licensees to achieve interoperability in the 800 MHz and 700 MHz Bands.
- If the Commission determines to afford a higher priority to providing additional funding for 800 MHz relocation costs than an additional 4.5 MHz of spectrum for Public Safety licensees, it should allocate such spectrum by a competitive public auction and require the auction winners to pay a portion of the total 800 MHz Band relocation costs. Preferred estimates that the winners

of such auction would be willing to pay as much as several hundred million dollars to relocate SMR, BILT and Public Safety Site licensees.

- Interference Protection Standards and Administrative Issues
 - The FCC should reject Nextel's requests for clarification that would weaken the interference protection standard imposed immediately by the *Report and Order* and delay the commencement of the thirty-six (36) month reconfiguration period.
 - The Commission should clarify the *Report and Order* by granting all General Category and Lower 80 EA licensees a waiver of their respective five (5)-year construction deadline on a day-for-day basis from the date of the publication of the *Notice of Proposed Rulemaking* in the WT 02-55 proceeding until the publication of the *Report and Order* in the Federal Register.

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Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by The Mobile Satellite Service)	ET Docket No. 95-18

To: The Commission

INTRODUCTION

On October 22, 2004, the Commission released a Public Notice seeking comments from interested parties with respect to several *ex parte* requests for clarification filed by Nextel Communications, Inc. and certain other 800 MHz SMR licensees and other participants in this proceeding.⁵ The FCC requested that comments be filed within ten (10) days of the publication of the Public Notice in the Federal Register, which occurred on November 22, 2004.

To respond fully to the requests for clarification and to provide the FCC with as complete a record as possible, Preferred has discussed certain issues in the *Report and*

⁵ See Public Notice, *Commission Seeks Comment on Ex Parte Presentations and Extends Certain Deadlines Regarding the 800 MHz Public Safety Interference Proceeding WT Docket No. 02-55*.

Order as yet unaddressed by the *ex parte* requests for clarification. Preferred then proposes possible solutions with respect to the treatment of 800 MHz Band Non-Nextel EA and Cellular-Architecture System licensees' EA- and Site-Licensed Spectrum, the allocation of 1.9 GHz Band spectrum and provision of full funding of 800 MHz Band relocation costs and 1.9 GHz Band clearing costs.

DISCUSSION

I. Reconfiguration of the 800 MHz Band

A. Present Licensing Scheme in the Private Land Mobile Radio Band

Under the Commission's present geographic overlay licensing system for SMR licenses in the Private Land Mobile Radio Band ("PLMRB") (806-824 MHz/851-869 MHz), a minimum of 26.5 MHz of spectrum is eligible to provide Commercial Mobile Radio Service ("CMRS") ("Cellular Eligible Service Spectrum").⁶ 9.5 MHz of spectrum in the PLMRB is reserved for public safety licensees.⁷ Beginning in 1997, the FCC conducted auctions of the Upper 200, General Category and Lower 80 Channels. Nextel won ninety percent (90%) or more of the licenses granted in the Upper 200 and Lower 80 auctions. However, in the General Category Channels' auction, it won only 76% of the licenses granted.

As a result, Nextel or Nextel Partners holds all of the EA-Licensed Spectrum in only fifty-eight (58) Economic Area ("EA") markets in which 151 million persons live. Nextel or Nextel partners share EA-Licensed Spectrum in one hundred seventeen (117) EA markets in which 133.5 million persons reside. In these EA markets, the EA-Licensed and Site-Licensed Spectrum therefore are held by nonaffiliated entities. In these EA markets this "dual ownership" increases the amount of present Cellular Service Eligible Spectrum from 26.5 MHz to as much as 31-32.5 MHz of such Spectrum.

⁶ This figure is comprised of 7.5 MHz of spectrum in the General Category Channels (806.0125-809.7375 MHz/851.0125-854.7375 MHz), 4 MHz in the Lower 80 Channels (16 5 Channels Blocks within 809.7625-815.9875 MHz/854.7625-860.9875 MHz), 10 MHz of spectrum within the Upper 200 Channels (816.0125-821.9875 MHz/861.0125-865.9875 MHz) and 5 MHz in the Business and Industrial Land/Transportation Channels' Pool (within 809.7625-815.9875 MHz/854.7625-860.9875 MHz). In this context, "cellular service" would be defined as set forth in the Consensus Parties' Reply Comment filed on February 25, 2003, at pp. 27-28 and nn. 59-60. *See also* Nextel Communications, Inc., Ex Parte Presentation, June 14, 2004, at p. 1.

⁷ This figure is comprised of seventy (70) channels within 809.7625-815.9875 MHz/854.7625-860.9875 MHz and the two hundred thirty (230) NPSPAC Channels (822-824 MHz/866-868 MHz), most of which use a 12.5 kHz, rather than a 25 kHz bandwidth. These latter channels comprise 6 MHz of spectrum.

B. *Report and Order*

The FCC sought in the *Report and Order* to mitigate, if not eliminate, interference with public safety and other systems in the PLMRB by separating high site and high power (“Non-Cellular”) systems from low and multi-cell site and low power (“Cellular”) systems.⁸ According to the Commission it was guided by the principle that it could minimize unacceptable interference in this Band by “placing similar system architectures in like spectrum and isolating dissimilar architectures from one another.”⁹

By largely adopting the Consensus Parties Proposal’s movement methodology,¹⁰ the Commission’s *Report and Order* adopted a plan that also seeks to

- (1) separate EA-Licensed Spectrum from Site-Licensed Spectrum;¹¹

⁸ *Report and Order*, at ¶¶ 1, 22 and 142-148.

⁹ *Id.*, at ¶ 22.

¹⁰ *Id.*, at ¶¶ 149-151 & n. 402. In declining to adopt Preferred’s Improvements, the FCC mischaracterized Preferred’s plan as not providing public safety licensees additional PLMRB spectrum rights. Under Preferred’s Improvements public safety licensees would be afforded exclusive access to seventy (70) additional PLMRB channels (channels 121-150; channels 201-208, 221-228, 241-248 and 261-268) or twenty (20) more channels than allocated to public safety licensees by the Consensus Parties’ Proposal. Although the FCC adopted Nextel’s subsequent modification of the Consensus Parties’ Proposal to provide for a Guard Band (816-817 MHz/861-862 MHz) and Expansion Band (815-816 MHz/860-861 MHz) in the *Report and Order*, given the number of Non-Nextel Site licenses required to be moved from Channels 1-150 and Channels 401-600 if the Non-Nextel EA and Cellular-Architecture System licensees’ spectrum holdings are to be relocated to Clean Upper 200 Channels spectrum held by the NCG, such Guard and Expansion Band practically will be unavailable to public safety licensees. See Concepts To Operations, Inc., *Analysis of the Relocation of Non-Nextel SMR, BILT and Public Safety Site Licenses in Channels 1-150 and 401-600 Under the FCC’s Report and Order (“CTO Report”)* attached hereto as **Exhibit A**, and Southern Communications Services, Inc., Ex Parte Presentation, October 8, 2004. Given the unavailability of these Bands, Preferred’s Improvements provide more additional spectrum to public safety licensees than does the rebanding approach adopted by the Commission in the *Report and Order*. Given the legal, practical and mathematical infirmities of the *Report and Order* and the FCC’s failure to articulate a basis for declining to adopt Preferred’s Improvements, a reviewing court likely would find that the Commission’s determination to select the Consensus Parties’ movement methodology and resulting PLMRB plan would be found to be arbitrary and capricious and an abuse of its discretion, or otherwise not in accord with law under the Administrative Procedure Act. See 5 U.S.C. §706(2)(A), Preferred March Ex Parte, at p. 46 (section is entitled “Additional Spectrum for Public Safety and Critical Infrastructure Licensees”) and Southern Communications Services, Inc., Ex Parte Presentation, June 21, 2004, at pp. 15-16. See also Comparison Channel Movement Charts attached hereto as **Exhibit B**.

- (2) separate the EA- and Site-Licensed Spectrum of Nextel Communications, Inc., (“Nextel”) Nextel Partners, Inc. (“Nextel Partners”) and licensees that have executed either a purchase option or management agreement with Nextel (“Nextel Control Group” or “NCG”) from that of the Non-Nextel EA licensees and certain Site licensees that have deployed Cellular-Architecture systems (“Cellular-Architecture System Licensees”);¹²
- (3) move the Nextel Control Group’s Site-Licensed Spectrum to the former NPSPAC Channels and 1.9 GHz Band spectrum on an EA market wide, Clean 1:1 basis;¹³ and
- (4) exclusively reserve the former NPSPAC Channels and 1.9 GHz Band spectrum to the NCG.¹⁴

Given the above, the *Report and Order* relocates Non-Nextel Control Group Site licenses in Channels 1-150 to the Interleave Channels (Channels 151-400) to be vacated by the NCG.¹⁵ Although it is somewhat unclear, the FCC’s rebanding rationale set forth above would appear to require relocation of Non-Nextel Site licenses in Channels 401-600 to channels 151-400 within the Non-Cellular Block.¹⁶ This conclusion is buttressed by the *Report and Order*’s relocation of Non-Nextel EA and Cellular-Architecture System licensees’ EA-Licensed and qualifying Site-Licensed Spectrum to the Clean Upper 200 Channels presently held and to be vacated by the Nextel Control Group. As set forth in the *CTO Report* attached hereto as **Exhibit A** absent relocation of the Non-Nextel Site licenses the NCG holds insufficient Upper 200 Channels spectrum to accommodate the *Report and Order*’s movement of Non-Nextel EA and Cellular-Architecture System licensees’ spectrum holdings without applying the *pro rata* distribution approach set forth in paragraph 168 and footnote 444. As discussed below and in Appendix I at length, the *pro rata* distribution approach clearly violates both the Due Process, Equal Protection and Takings Clauses of the Fifth Amendment to the U.S. Constitution¹⁷ and the Commission’s statutory mandates to promote regulatory parity¹⁸ and to promote competition.¹⁹

¹¹ See Mobile Relay Associates’ and Skitronics, LLC’s Motion for Partial Stay of Decision Pending Appellate Review, November 19, 2004; Preferred Communication Systems, Inc., Ex Parte Presentation, March 2, 2004, at p. 27 (“Preferred March Ex Parte”).

¹² See *Report and Order*, at ¶¶ 151, 168 & n. 444, 196, 325 & n. 743; Preferred March Ex Parte, at pp. 26-27, 29-35 and 43-44.

¹³ *Id.*, at ¶¶ 23, 68-74 and 198; see also Preferred March Ex Parte, at pp.

¹⁴ See *Report and Order*, at ¶¶ 65-74, 151 and 198; see also Preferred March Ex Parte, at pp. 25-28 and 41-43.

¹⁵ See *Report and Order*, at ¶¶ 23, 151 and 198.

¹⁶ See *id.*, at ¶¶ 1-2, 22, and 142-148.

¹⁷ For a general discussion of the constitutional limitations upon the FCC’s authority to modify licenses under Section 316, see William L. Fishman, *Property Rights, Reliance and Retroactivity Under the Communications Act of 1934*, 50 Federal Communications Law Journal 2, 13-23 (1997)(“*Fishman*”). See also Preferred March Ex Parte, at p. 29 & n. 58.

In paragraph 162 of the Report and Order²⁰, the Federal Communications Commission (“FCC” or “Commission”) provided Non-Nextel EA and Cellular-Architecture System Site licensees (“Cellular System Site Licensees”) an “incentive” to relocate their respective systems by providing them the flexibility of the following three options:

- (1) Relocate all of their systems in an EA market into the ESMR portion (817-824 MHz/862-869 MHz) portion of the band where they will share spectrum with Nextel, Nextel Partners and licensees which have executed a management or purchase option agreement with Nextel (“Nextel Control Group” or “NCG”);
- (2) Relocate their systems as close as possible to the ESMR portion of the band but remain in the non-cellular portion of the band, i.e., in order of preference:
 - (a) the 816-817 MHz/861-862 MHz Guard Band;
 - (b) the 815-816 MHz/860-861 MHz Expansion Band; and
 - (c) channels below 815 MHz/860 MHz if necessary.

According to the FCC, these licensees will operate on a strict non-interference basis, subject to pre-coordination of any new or modified operations; or

- (3) Remain on their current channels in the non-cellular portion of the band on a strict non-interference basis, subject to pre-coordination of any new or modified operations.

In paragraph 163, the FCC expounded upon the first option it afforded Non-Nextel EA and certain Site licensees. According to the Commission, if a Non-Nextel EA or Cellular-Architecture System Site Licensees elect to relocate to the ESMR portion of

¹⁸ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 § 6002(d)(3)(B), 107 Stat. 312, 397 (1993), 47 U.S.C. § 332 (c). *See Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, First Report and Order, Eighth Report and Order and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463, at 1483, ¶ 23 & n. 88 (“800 MHz SMR First Report and Order”); *Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, Second Report and Order, 12 FCC Rcd 19079 at 19087-88, ¶¶ 10, 12 and 15 & n. 35 (800 MHz SMR Second Report and Order”); *Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, Memorandum Opinion and Order of Reconsideration, 14 FCC Rcd 17556 at 17564, ¶ 11 & n. 30 (“800 MHz SMR Memorandum Opinion”).

¹⁹ 47 U.S.C. § 309(j)(3)(B) and (4)(C) and 47 U.S.C. § 257.

²⁰ *Report and Order*, at ¶ 162.

the band, their EA licenses will move upon an EA market wide, Clean 1:1 basis. The FCC also recognized that these Licensees also hold Site-Licensed Spectrum. The FCC therefore also determined to provide these Licensees the option of relocating their Site-Licensed Spectrum along with their EA-Licensed Spectrum to the ESMR portion of the band. However, to transfer Site-Licensed Spectrum, a Non-Nextel EA or Cellular-Architecture System Site Licensee must:

- (a) currently hold an EA license in the relevant EA market; and
- (b) be using the Site-Licensed Spectrum as part of a cellular-architecture system in that EA market as of the date of the publication of the *Report and Order* in the Federal Register.

Moreover, to create a more uniform licensing scheme, the transferred Site-Licensed Spectrum would be converted to EA-Licensed Spectrum on a Clean 1:1 basis. If Non-Nextel EA or Cellular-Architecture System licensees elect to move to Guard Band or must be relocated to the Expansion Band, or to the spectrum immediately below, when necessary, subject to the conditions set forth immediately above, their Site-Licensed Spectrum also would be converted to EA-Licensed Spectrum on a Clean 1:1 basis.

In footnote 444 to paragraph 168 of the *Report and Order*, the FCC seemingly contradicts the three preceding paragraphs by placing an additional limitation upon the movement of EA- and Site-Licensed Spectrum held by Non-Nextel EA and Cellular-Architecture System Site Licensees into the ESMR portion of the band. In paragraph 164 the Commission had noted that in some EA markets insufficient spectrum in the ESMR portion of the band may be available due to multiple incumbent ESMR licensees already operating in the band. The FCC cited, but did not limit this possible problem of insufficient spectrum to, those markets in which Nextel or Nextel Partners and Southern Communications Services (“Southern”) are offering service. Noting that Southern holds a large number of channels (average of 85 channels in its core markets) in the interleaved portion of the band and licenses for some General Category channels (average of 94 channels in its core markets). Although not mentioned by the Commission, Southern also holds a considerable number of Lower 80 channels (average of 26 channels in its core markets). Southern therefore holds an average of 205 Interleaved, Lower 80 and General Category Channels (10.2 MHz of spectrum) in its core markets. In several of these EA markets, Southern also holds the A Frequency Block EA Authorization in the Upper 200 Channels. We have attached a Summary Spreadsheet and a Complete Spreadsheet detailing Southern’s and Nextel’s or Nextel Partners’ spectrum holdings in these and other EA markets as **Schedule 4** hereto. As a result, the FCC concluded that are an inadequate number in the 816-824 MHz/861-869 MHz band to replicate the channel capacity of both Southern and Nextel or Nextel Partners.

The Commission noted that in *ex parte* filings Southern and Nextel had cited a preliminary agreement in which they proposed to widen the 816-824 MHz/861-869 MHz band such that the lower edge would begin at 813.5 MHz/858.5 MHz. With the ESMR portion of the band so widened by one hundred (100) paired channels, Southern and Nextel would engage in a channel-for-channel exchange that would result in the

configuration of channels shown in Appendix G to the *Report and Order*. Although the FCC noted that the Southern and Nextel agreement was not final and that the parties had not been able to agree on a final apportionment of channels in the Atlanta, Georgia EA market, on its own motion the Commission defined the ESMR portion of the band in the area shown in Appendix G as the band segment 813.5-824 MHz/858.5-869 MHz. The Expansion Band in these markets shall extend from 812.5-813.5 MHz/857.5-858.5 MHz.

In paragraph 168 the FCC provides that if Nextel and Southern fail to reach such agreement within the prescribed period, they shall submit their differences to the Transition Administrator who will attempt to facilitate a final agreement. If the disputed matters are not resolved within thirty (30) days, the Transition Administrator will submit the entire record to the Commission for *de novo* review. The FCC then continues by stating that “[p]arties are hereby put on notice that disputed matters concerning the ESMR channels in any area of the country, including the area shown in Appendix G may be resolved by the Commission making a *pro rata* distribution of ESMR channels.” Citing footnote 444, the FCC then states in that footnote: “When the ESMR spectrum is not adequate to accommodate all eligible licensees that wish to relocate in the ESMR block, and parties are unable to agree, we may apportion the ESMR block as a function of the relative spectrum rights each licensee holds in a given EA. For example, in a hypothetical market, outside the area shown in Appendix G, in which licensee “A” currently has rights to 150 channels and licensee “B” has rights to 250 channels, the 320 channels in the ESMR block would be apportioned by giving licensee “A” access to 128 channels (40%) and licensee “B” access to 192 channels (60%).”

1. Underlying Assumptions of *Report and Order*.

In largely adopting the Consensus Parties Proposal’s movement methodology, the *Report and Order* necessarily accepted most, if not all, of that Proposal’s assumptions with respect to the sufficiency of the Nextel Control Group’s spectrum holdings within (a) the Interleave Channels (Channels 151-400) to accommodate the relocation of Non-Nextel SMR, BILT and Public Safety Site Channels within Channels 1-150²¹ and if the Commission’s rebanding rationale is to be applied consistently,²² the Non-Nextel SMR, BILT and Public Safety Site Channels within Channels 401-600.²³ Under the *Report and Order*, such relocated Site licensees are required to receive “comparable facilities.”²⁴ Such term encompasses the following:

²¹ See *Report and Order*, at ¶¶ 23, 153.

²² See n. 9 *supra*.

²³ See Non-Nextel SMR, BILT and Public Safety Site Licenses spreadsheet attached as **Schedule 1** to the *CTO Report* attached hereto as **Exhibit A**.

²⁴ See *Report and Order*, at ¶ 201 & n. 527.

- (1) equivalent channel capacity (defined by the FCC's rules as the same number of channels with the same bandwidth that is currently available to the end user);²⁵
- (2) equivalent signaling capability, baud rate and access time;²⁶
- (3) coextensive geographic coverage;²⁷ and
- (4) operating costs.²⁸

To test the *Report and Order*'s assumption set forth above, Preferred retained Concepts To Operations, Inc., a RF engineering and information systems consulting firm headquartered in Annapolis, Maryland ("CTO"), to download the Non-Nextel SMR, BILT and Public Safety Site licenses in Channels 1-150 and 401-600 in every EA market and prepare a license spreadsheet reflecting these results. Preferred also requested that CTO to determine whether the Nextel Control Group held sufficient spectrum within Channels 151-400 to accommodate the Report and Order's proposed relocation of such Non-Nextel Site licenses. Finally, since the Commission's rules require such relocated Site licenses to receive coextensive geographic coverage, Preferred requested that CTO compare the "footprints" of the Non-Nextel Site SMR, BILT and Public Safety licenses to be relocated in the top eleven (11) EA markets as ranked by population used by the FCC to determine Nextel's 800 MHz General Category, Lower 80 and BILT spectrum holdings²⁹ to the "footprints" of the Interleave Channels (Channels 151-400) presently held and to be vacated by the NCG.³⁰

CTO initially examined whether the Nextel Control Group holds sufficient Interleave Channels to accommodate the relocation of Non-Nextel SMR, BILT and Public Safety Site licenses from both Channels 1-150 and Channels 401-600 on a total channels basis. Based upon the FCC's license database as of June 30, 2004, CTO found that in forty-nine (49) more "heavily congested" EA markets in which 174.79 million persons (2003 census figures) reside, the NCG lacks sufficient spectrum within the Lower 80 Channels to accommodate either the relocation of

²⁵ See *id.*, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of 800 MHz Systems in the 800 MHz Frequency Band, Second Report and Order, PR Docket No. 93-144, 12 FCC Rcd 19079, 19112-13 ¶ 92 (1997) ("800 MHz SMR Second Report and Order"); see also 47 C.F.R. § 90.699(d)(2).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *Report and Order*, at ¶ 318 & n. 733.

³⁰ For this purpose CTO used both the actual coverage and the 22 dBu contour boundary of the Non-Nextel SMR, BILT and Public Safety licensees and the Nextel Control Group to compare "footprints." Although the Commission's rules and the *Report and Order* are somewhat unclear on this point, Preferred and CTO adopted the position that the term "coextensive geographic coverage" means virtually identical geographic and population coverage at the same site coordinates or at a site coordinate that would represent a minor modification thereof (would not increase the contour boundary).

- (1) Non-Nextel SMR, BILT and Public Safety Site licenses in Channels 1-150; and
- (2) those Site licensees and the Non-Nextel SMR, BILT and Public Safety Site licenses in Channels 401-600.

CTO then assumed that all of the NCG's BILT Channels' site coordinates and geographic "footprints" match³¹ and subtracted the Nextel Control Group's BILT channels from the excess Non-Nextel SMR, BILT and Public Safety licenses in the forty-nine (49) "heavily congested" EA markets. As CTO's Report indicates, even if all of the NCG's Interleave Channels' geographic "footprints" match those of the Non-Nextel SMR, BILT and Public Safety licenses within Channels 11-150 and 401-600 to be relocated under the *Report and Order's* movement methodology, in thirty-eight (38) EA markets in which 103.18 million persons reside, or approximately thirty-six percent (36%) of the U.S. population, the NCG still lacks sufficient spectrum holdings to accommodate the *Report and Order's* relocation of Non-Nextel SMR, BILT and Public Safety licenses.

CTO then examined the alternative rebanding scenario pursuant to which the Transition Administrator and the FCC do not relocate Non-Nextel SMR, BILT and Public Safety Site licenses from the Upper 200 Channels to the Interleave Channels presently held by and to be vacated by the Nextel Control Group. Given the Report and Order's exclusive reservation of the former NPSPAC Channels and the 1.9 GHz Band Spectrum respectively to the NCG and Nextel,³² CTO sought to determine whether the Nextel Control Group holds sufficient Clean spectrum holdings in the Upper 200 Channels to accommodate the *Report and Order's* relocation of Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum.

CTO downloaded the FCC license database as of June 30, 2004 with respect to Non-Nextel SMR, BILT and Public Safety licenses in the Upper 200 Channels and created the Nextel Control Group Clean Spectrum Holdings in Channels 410-600 spreadsheet attached hereto as **Schedule 3** to *CTO's Report*. As this **Schedule** indicates, in the majority of EA markets the NCG holds sufficient Clean Upper 200 Channels spectrum to accommodate the relocation of the Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum. However, in forty (40) EA markets, in which 64.28 million persons, or approximately 22.46% of the total U.S. population resides, the Nextel Control Group lacks sufficient Clean Upper 200 Channels to accommodate the relocation of the Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum.

³¹ For this purpose CTO considered that a "match" would exist if the Non-Nextel SMR, BILT or Public Safety Site license's site coordinates were within a one quarter mile of the site coordinates of the Nextel Control Group's Interleave Channel and the relocation would constitute a minor modification under the Commission's rules.

³² See n. 14 *supra*.

Given these results, CTO now is examining the geographic “footprints” of each Non-Nextel SMR, BILT and Public Safety Site licenses in Channels 1-150 and 401-600 and those of the Nextel Control Group in the top eleven (11) EA markets by population to determine the extent of this spectrum “shortfall.” Preferred will submit CTO’s findings concerning whether the NCG’s Interleave Channels spectrum holdings are sufficient to satisfy the Commission’s rules concerning “comparable facilities” set forth above to the FCC when they become available within the next few days.

2. Legal Infirmities of *Report and Order*.

Given the practical and even mathematical infirmities of the *Report and Order*, a reviewing court necessarily will employ a heightened degree of scrutiny with respect to the FCC’s rationale(s) for its discriminatory treatment of Non-Nextel EA and Cellular-Architecture System licensees with respect to movement within the PLMRB. As noted above, the *Report and Order* exclusively reserves to the Nextel Control Group both the

- (1) former NPSPAC Channels (Channels 601-830 under the present PLMRB licensing scheme);³³ and
- (2) 10 MHz of 1.9 GHz Band spectrum.³⁴

In the fifty-six (56) EA markets in which Nextel or Nextel Partners holds all of the General Category and Lower 80 EA-Licensed Spectrum, the *Report and Order*’s rebanding approach is both logical and relatively simple.³⁵ One hundred twenty (120) channels of the General Category EA authorizations move on an EA market wide Clean 1:1 basis to the former NPSPAC Channels.³⁶ Although the Report and Order is silent on this point, the thirty (30) excess General Category EA channels necessarily would be modified and swapped or exchanged for 1.9 GHz Band spectrum on an EA market wide, Clean 1:1 basis.³⁷ Similarly, Nextel’s or Nextel Partners’ Lower 80 EA and BILT Site Channels would be modified by swapping or exchanging them for 1.9 GHz Band spectrum on an EA market wide Clean and 1:1 basis.³⁸ In these EA markets Nextel and Nextel Partners experience a considerable increase in their respective Total, Clean and Cellular Service Eligible Spectrum.³⁹

In the one hundred nineteen (119) EA markets in which Nextel or Nextel Partners shares EA-Licensed Spectrum with Non-Nextel EA and Cellular-Architecture

³³ See *id.*

³⁴ See *id.*

³⁵ These EA markets are set forth in spreadsheets attached hereto as **Exhibits C and D**.

³⁶ See *Report and Order*, at ¶¶ 151, 198 and 325 & n. 743.

³⁷ See *id.*, at ¶¶ 11, 23, 31, 35, 65-74, 198, 307, 314-16, 321 and 325 & n. 743.

³⁸ See *id.*, at ¶¶ 11, 23, 31, 35, 65-74, 151, 198, 307, 317-18, 323 and 325 & n.743.

³⁹ See the Nextel Control Group’s Clean Spectrum Holdings in Channels 401-600 spreadsheet attached hereto as **Schedule 2** to CTO’s *Report*.

System licensees,⁴⁰ the Report and Order's rebanding approach becomes illogical and convoluted. Given the *Report and Order's* adoption of the Consensus Parties' movement methodology, it necessarily accepted their goal of separating the Nextel Control Group's EA- and Site-Licensed Spectrum from that of the Non-Nextel EA and Cellular-Architecture System licensees.⁴¹ As a result, the *Report and Order* excludes the Non-Nextel EA and Cellular-Architecture System licensees from relocating to the former NPSPAC Channels⁴² and the 1.9 GHz Band spectrum exclusively reserved to the NCG.⁴³

As noted above, under the FCC's present PLMRB licensing scheme, a minimum of 26.5 MHz of spectrum is Cellular-Service Eligible Spectrum in all one hundred seventy-five (175) EA markets.⁴⁴ In the one hundred nineteen (119) EA markets in which Nextel and Nextel Partners share EA-Licensed Spectrum with Non-Nextel EA licensees, this figure increases to 31-32 MHz due to the Commission geographic overlay licensing scheme. In seeking to bifurcate the present PLMRB into two separate blocks for Non-Cellular (22 MHz) and Cellular (14 MHz) systems⁴⁵ and precluding the Non-Nextel EA and Cellular-Architecture System licensees from the former NPSPAC Channels and the 1.9 GHz Band as replacement spectrum, the *Report and Order* necessarily is required to squeeze these licensees' spectrum holdings into the Clean Upper 200 Channels presently held and to be vacated by the NCG.

In many EA markets the Nextel Control Group holds sufficient Clean Upper 200 Channels spectrum to accommodate the relocation of Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum without requiring Nextel or Nextel Partners to vacate a considerable portion of their respective

⁴⁰ These EA markets are set forth in spreadsheets attached hereto as **Exhibits E and F**.

⁴¹ See Preferred March Ex Parte, at pp. 2-3, 25-29 and 41-44.

⁴² See AirPeak Communications, LLC Ex Parte Presentation, August 16, 2004; and AirPeak Communications, LLC Ex Parte Presentation, September 23, 2004. Preferred has learned that the Wireless Telecommunications Bureau staff recently has indicated to both AirPeak and Airtel Wireless, LLC, both Cellular-Architecture System licensees, that their respective General Category and Lower 80 EA- and Site-Licensed and BILT Site Channels spectrum holdings may be relocated to the former NPSPAC Channels.

⁴³ See n. 14 *supra*.

⁴⁴ See n. 6 *supra*; *Report and Order*, at ¶¶ 22 and 36-39.

⁴⁵ In the *Report and Order*, the Commission states that it is allocating 18 MHz of PLMRB spectrum to the Non-Cellular Block and 14 MHz of such spectrum to the Cellular Block. See *Report and Order*, at ¶¶ 11 and 151. Since the 4 MHz in the Guard and Expansion Bands are available to Public Safety and other Non-Cellular System licensees and that no Non-Nextel EA licensee would elect to move any of their respective EA authorizations to such Bands, Preferred believes that this spectrum properly should be considered part of the Non-Cellular Block. See Southern Communications Services, Ex Parte Presentation, October 8, 2004 (insufficient spectrum for Expansion Band to which Public Safety licensees could be relocated in the Atlanta, Georgia EA market due to numerous Non-Nextel and Non-Southern licensees in Channels 1-150; therefore requested clarification that Expansion Band restrictions not applicable to this EA market).

Upper 200 Channels. However, as the Nextel Control Group's Clean Spectrum Holdings in Channels 401-600 spreadsheet attached hereto as **Schedule 3** to *CTO's Report* indicates in forty (40) EA markets in which 64.28 million persons reside, Nextel or Nextel Partners lack sufficient Clean Upper 200 Channels to accommodate the relocation of the Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum without vacating a considerable portion of its Upper 200 Channels spectrum and incurring significant capital expenditures for additional cell sites to replace lost operating system capacity.⁴⁶

To minimize the loss of the Nextel Control Group's Upper 200 Channels and capital expenditures that otherwise be required to maintain operating system capacity the FCC added the language to paragraph 168 and footnote 444 extending the pro rata distribution approach beyond Southern's core EA markets in Georgia, Alabama, southeastern Mississippi and northern Florida set forth in the *Report and Order's* Appendix G to any dispute between a Non-Nextel or Cellular-Architecture System licensee and Nextel or Nextel Partners with respect to ESMR channels.⁴⁷ Under this approach, in the one hundred nineteen (119) EA markets in which Nextel or Nextel Partners shares EA-Licensed Spectrum with Non-Nextel EA and Cellular-Architecture System licensees, Nextel or Nextel Partners would experience an increase or maintain its present Total Spectrum and a considerable increase in its Clean and Cellular-Service Eligible Spectrum.

In the Sacramento, California EA market, for example, without the application of the *pro rata* distribution approach under the *Report and Order* Nextel's Total Spectrum would increase from 21.55 to 26.0 MHz. Its MHz/Pops Equivalent and EA-Wide Market Spectrum respectively would increase from 18.40 MHz and 16.50 MHz to 26.0 MHz. To accommodate the relocation of Preferred's and AirPeak Communications, LLC's EA- and qualifying Site-Licensed Spectrum comprising one hundred forty (140) channels or 7 MHz, Nextel would vacate one hundred forty (140) of its two hundred (200) Clean Upper 200 Channels. Nextel's Total, MHz/Pops Equivalent and EA-Wide Market Spectrum therefore respectively would be reduced by 7 MHz to 19.0 MHz. While Nextel would experience a slight reduction in its Total Spectrum, its MHz/Pops Equivalent and EA-Wide Market Spectrum respectively would increase by 3.26% and 15.2%.

However, if the *pro rata* distribution approach is applied, Nextel would receive 70.83 % of the three hundred twenty (320) channels available or two hundred twenty-seven (227) channels.⁴⁸ Preferred and AirPeak Communications, LLC would receive the remaining ninety-three (93) channels. Under this approach, Nextel would

⁴⁶ See Nextel Communications, Inc., Ex Parte Presentation, June 14, 2004, at pp. 4-5 & n. 17.

⁴⁷ See *Report and Order*, at ¶ 168 and n. 444.

⁴⁸ Although the Cellular Block consists of only 14 MHz, in footnote 444 the FCC used three hundred twenty (320) channels or 16 MHz in its example of how the pro rata distribution approach would be applied by the Commission.

recover forty-seven (47) channels or 2.35 MHz of spectrum and Preferred and AirPeak Communications, LLC collectively would lose that number of channels. Nextel's Total Spectrum thus would be reduced from 21.55 MHz to 21.35 MHz, or .25 MHz. Its MHz/Pops Equivalent and EA-Wide Market Spectrum respectively similarly would be increased to 21.35 MHz, a considerable increase of 2.95 MHz of MHz/Pops Equivalent Spectrum and 4.85 MHz of Cellular-Service Eligible Spectrum.⁴⁹

By contrast, Preferred and AirPeak Communications, LLC's Total Spectrum would be reduced from one hundred forty (140) to only ninety-three (93) channels, a decrease of forty-seven (47) channels, or 33.58% decrease in Total Spectrum. Preferred's sixty (60) MHz/Pops Equivalent and seventy-five (75) Cellular-Service Eligible channels would be reduced to fifty (50) channels, respectively a 16.7% and 33.3% decrease. AirPeak Communications, LLC's sixty-five (65) Total Channels would be reduced to thirty-eight (38) channels, a 42.54% decrease.⁵⁰ In discussing the pro rata distribution approach with respect to Nextel's and Southern's EA- and Site-Licensed Spectrum, the Commission noted that both companies would suffer a reduction in their respective total number of channels.⁵¹ However, the FCC maintained that Nextel has additional spectrum at 900 MHz which it can use to offset the shortfall and is receiving 10 MHz of 1.9 GHz Band spectrum.⁵² According to the Commission Southern's loss of total channels was mitigated by its relocation to the Cellular Block and receipt of Clean and contiguous spectrum arguably of greater value and capacity than the spectrum it now occupies.⁵³ However, based upon Preferred's analysis of five (5) representative EA markets in which Nextel or Nextel Partners shares EA-Licensed Spectrum with one or more Non-Nextel EA licensees and/or Cellular-Architecture System licensees, it appears that the FCC's characterization of the mitigating effect of Non-Nextel EA and/or Cellular-Architecture System licensees' receiving Clean Spectrum is incorrect.⁵⁴

⁴⁹ To make up for this perceived Total Spectrum shortfall, the FCC amended its rules so that Nextel could use its 900 MHz Band Spectrum holdings for CMRS. Moreover, the Commission's amendment permitted other 900 MHz Band licenses to sell or otherwise assign their respective licenses to Nextel for CMRS use. *See* 47 C.F.R. § 90.621(f); *Report and Order*, at ¶ 6. Based upon Nextel's published spectrum holdings, the FCC's amendment would increase Nextel's 800 and 900 MHz EA-Wide Market Spectrum by approximately seventy-two (72) channels, or 3.6 MHz.

⁵⁰ For further discussion of the application of the pro rata distribution approach and its practical, mathematical and legal infirmities, please review Appendix I attached hereto.

⁵¹ *See* Report and Order, at ¶ 168.

⁵² *Id.*

⁵³ *Id.* As discussed in Appendix I attached hereto, even in Southern's core EA markets (Georgia, Alabama, southeast Mississippi and northern Florida), the *pro rata* distribution approach operates to reduce Nextel's or Nextel Partners' Total Spectrum slightly while considerably increasing its Clean and Cellular-Service Eligible Spectrum and, by contrast, reduce Southern's Total, Clean and Cellular-Service Eligible Spectrum.

⁵⁴ For a detailed discussion of the effect of the pro rata distribution approach upon the spectrum holdings of Non-Nextel EA and Cellular-Architecture System licensees in the

In seeking to separate the Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum from that of the Nextel Control Group and reduce their respective Total, and in many EA markets, MHz/Pops Equivalent and Cellular-Service Eligible Spectrum, the *Report and Order* impermissibly discriminates against the Non-Nextel EA and Cellular-Architecture System licensees as follows:

- (1) exclusively reserves the former NPSPAC Channels as replacement spectrum to the Nextel Control Group;⁵⁵
- (2) exclusively reserves the 1.9 GHz Band spectrum as replacement spectrum to Nextel and Nextel Partners;⁵⁶
- (3) through application of the pro rate distribution approach set forth in paragraph 168 and n. 444, conditions the relocation of Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum to the Cellular Block to their acceptance of a reduction in their respective Total, and in many EA markets, Clean and Cellular-Service Eligible Spectrum;⁵⁷ and
- (4) relocates the NCG's unconstructed Site-Licensed Spectrum to the former NPSPAC Channels and the 1.9 GHz Band spectrum on an EA market wide Clean 1:1 basis while imposing conditions upon the movement of Non-Nextel EA and Cellular-Architecture Systems licensees' constructed and unconstructed Site-Licensed Spectrum.⁵⁸

In 1993 Congress enacted the Omnibus Budget Reconciliation Act. Included in this legislation was an amendment of Section 332 of the Communications Act of 1934, as amended. Pursuant to this amendment the Commission is required to maintain regulatory parity among cellular, PCS and SMR licensees, all of whom fall under the category of Commercial Mobile Radio Service ("CMRS") providers.⁵⁹ Although Nextel refers to the Commission's statutory requirement to maintain regulatory parity only in terms of the FCC's providing equal regulatory treatment with respect to the cellular and PCS carriers and itself,⁶⁰ Preferred maintains that the FCC's duty to maintain regulatory parity is even more applicable to providers within a single service, such as Nextel, Nextel

Sacramento, California, Washington-Baltimore, DC-Maryland, Atlanta Georgia, Puerto Rico and the Staunton, Virginia, *see* Appendix I attached hereto.

⁵⁵ *See* n. 14 *supra*.

⁵⁶ *See id.*

⁵⁷ *See generally* Appendix I attached hereto and Nextel Control Group's Clean Spectrum Holdings in Channels 401-600 in **Schedule 3** attached thereto.

⁵⁸ *See* Report and Order, at ¶ 163.

⁵⁹ 47 U.S.C. § 332(d)(2). *See Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1417 (1994) ("CMRS Second Report and Order") and Preferred March Ex Parte, at pp.16-17 & n. 11-22.

⁶⁰ *See, e.g.,* Nextel Communications, Inc., Supplemental Response, May 7, 2004, at pp. 10, 13, 17-18; Nextel Communications, Inc., Comments, May 6, 2002, at pp. 12-13.

Partners, Southern, Preferred, A.R.C., Inc., AirPeak Communications, LLC, Skitronics, LLC and Airtel Wireless, LLC.⁶¹ In addition, in two separate statutes Congress has mandated that the FCC promote competition among SMR operators.⁶²

In the *Fresno Mobile Radio* decision⁶³, the D.C. Circuit Court of Appeals found that the Commission could not discriminate among similarly situated EA licensees and the holders of Extended Implementation Authorizations (“EIA”) with respect to construction requirements absent articulation of a reasonable basis for the disparity in regulatory treatment.⁶⁴ Ironically, in the *Fresno Mobile Radio remand* proceeding, Nextel itself filed comments in support of regulatory parity. Nextel specifically requested that the Commission afford wide area 800 MHz SMR licensees using BILT Channels the same flexible construction requirements as those given to other CMRS providers because they provide similar services.⁶⁵ Nextel now argues and the *Report and Order* provides that for purposes of 800 MHz rebanding the reverse is true with respect to Non-Nextel EA and Cellular-Architecture Systems licensees other than Southern.

The Consensus Parties’ Proposal largely adopted by the FCC sought to differentiate between the Nextel Control Group and the Non-Nextel EA licensees primarily upon the present construction status or architecture of their respective systems.⁶⁶ Recognizing the weakness of the so-called “Cellular Deployment Test,” the FCC apparently sought to address Nextel’s opposition to relocating Non-Nextel EA and Cellular-Architecture System licensees EA- and qualifying Site-Licensed Spectrum.⁶⁷ However, absent articulation of a reasonable basis for:

- (1) excluding the Non-Nextel EA and Cellular-Architecture System licensees’ (other than perhaps AirPeak Communications, LLC and Airtel Wireless, LLC) EA- and qualifying Site-Licensed Spectrum from relocating to the former NPSPAC Channels as replacement spectrum;⁶⁸

⁶¹ See Southern Communications Services, Inc., Ex Parte Presentation, June 21, 2004, at p. 5.

⁶² 47 U.S.C. § 309 (j)(3)(B) and (4)(C) and 47 U.S.C. § 257. See, e.g., Public Notice, *Media Bureau Seeks Comment on Ways to Further Section 257 Mandate and to Build on Earlier Studies*, June 15, 2004.

⁶³ *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965 (D.C. Cir. 1999).

⁶⁴ *Id.*, at 970.

⁶⁵ Nextel Communications, Inc., Comments, March 27, 2000, PR Docket No. 93-144, at 1-2, and 5-6.

⁶⁶ See Preferred March Ex Parte, at pp. 25-26.

⁶⁷ See Nextel Communications, Inc., Ex Parte Presentation, June 14, 2004, at p. 5.

⁶⁸ As pointed out by AirPeak Wireless Communications, LLC in a recent *ex parte* presentation, allowing Non-Nextel EA and Cellular-Architecture System licensees to select the channels within the Cellular Block to which their respective EA- Licensed and qualifying Site-Licensed Spectrum would be relocated would require fewer re-tunings, less time and less expense than the approach advocated by Nextel and adopted in the

- (2) excluding the Non-Nextel EA and Cellular-Architecture System licensees' EA- and qualifying Site-Licensed Spectrum from relocating to the 1.9 GHz Band spectrum as replacement spectrum;⁶⁹
- (3) conditioning the relocation of Non-Nextel EA and Cellular-Architecture System licensees' EA- and Site-Licensed Spectrum to the Cellular Block upon their acceptance of reduction of their respective Total, and in many EA markets, Clean and Cellular-Service Eligible Spectrum while increasing considerably the NCG's Clean and Cellular-Service Eligible Spectrum; and
- (4) imposing conditions upon the relocation of Non-Nextel EA and Cellular-Architecture System licensees' constructed and unconstructed Site-Licensed Spectrum to the Cellular Block while moving the Nextel Control Group's constructed and unconstructed Site-Licensed Spectrum to the Cellular Block and 1.9 GHz Band spectrum on an EA market Clean and 1:1 basis⁷⁰

a reviewing court necessarily would reach the same result as the *Fresno Mobile Radio* decision, namely that the Commission's discriminatory treatment of Non-Nextel EA and Cellular-Architecture System licensees was arbitrary and capricious in violation of Section 5 of the Administrative Procedure Act.⁷¹

Moreover, as noted above, Congress has addressed the precise questions at issue.⁷² As the FCC notes in the *Report and Order*, Section 316 of the Communications Act grants the FCC broad authority to modify already existing licenses.⁷³ However, such

Report and Order by the FCC. See AirPeak Communications, LLC, Ex Parte Presentation, September 23, 2004, at pp. 3-4.

⁶⁹ See n. 14 *supra*.

⁷⁰ Arguably, by imposing the *pro rata* distribution approach and relocating the NCG's constructed and unconstructed Site-Licensed Spectrum on an EA market Clean and 1:1 basis, the FCC is forcibly confiscating the Non-Nextel EA and Cellular-Architecture System licensees' Total and, in many EA markets, Clean and Cellular-Service Eligible Spectrum and transferring them to the NCG. For a detailed discussion of this point, see Appendix I attached hereto. For a discussion of the Consensus Parties Proposal's attempt to affect the same result, see Preferred March Ex Parte, at pp. 27-29.

⁷¹ 5 U.S.C. § 706(2)(A). See *Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1389 (D.C. Cir. 1995). Such disparate treatment involving the Non-Nextel EA and Cellular-Architecture System licensees' loss of spectrum rights and the failure by the Commission to articulate a reasonable basis therefor violates the Due Process, Equal Protection and Takings Clauses of the Fifth Amendment to the U.S. Constitution. See *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that the Fifth Amendment's Due Process Clause prohibits arbitrary discrimination by the federal government); Appendix I attached hereto; *Southern Communications Services, Inc., Ex Parte Presentation*, June 21, 2004, at p. 11; and *Fishman*, at pp. 11- 13.

⁷² See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

⁷³ See *Report and Order*, at ¶¶ 12, 65-74.

broad authority clearly is circumscribed by the statutory mandates enacted by Congress requiring the FCC to exercise such modification authority so as to maintain regulatory parity among cellular, PCS and SMR licensees and among SMR licensees as a single class and promote competition among such licensees. Given the *Report and Order*'s violation of these statutory mandates, a reviewing court necessarily would disallow the FCC's exercise of its modification authority.

Finally, as noted by Southern, the Commission cannot make any lawful distinctions between the Nextel Control Group and the Non-Nextel EA and Cellular-Architecture System licensees with respect to the relocation of their respective EA- and Site-Licensed Spectrum within the PLMRB.⁷⁴ Neither Nextel's promise to contribute funds to pay the total 800 MHz band relocation costs and its pro rata share of the UTAM relocation and all of the BAS licensee relocation costs in the 1.9 GHz Band spectrum nor its interference with public safety and other licensees' systems in the PLMRB can justify the *Report and Order*'s different treatment. As Southern pointed out, Nextel Partners, which is not promising to pay \$1 toward 800 MHz or other relocation costs and causes little, if any, interference with public safety and other licensees' systems in the 800 MHz Band, is afforded the same favorable treatment as Nextel.⁷⁵

C. Nextel's and Others' Requests for Clarification

In *ex parte* presentations filed in September 2004, Nextel requested the following "clarifications" to the *Report and Order* with respect to its relocation of licenses within the PLMRB. First, Nextel contends that SMR, BILT and Public Safety licensees should not be moved from Channels 121-150 with the General Category Channels are unnecessary to carry out the Commission's reorganization of the PLMRB, would disrupt incumbents without countervailing public interest benefits and not result in additional spectrum becoming available for use by public safety licensees.⁷⁶ Interestingly enough, the Commission determined to relocate SMR, BILT and Public Safety Site licenses from Channels 121-150 to provide nationwide access to thirty (30) channels or 1.5 MHz of spectrum.⁷⁷

As noted above, Preferred's Improvements relocated SMR, BILT and Public Safety Site licenses from Channels 121-150 to the Interleave Channels presently held and to be vacated by the Nextel Control Group on a matching geographic "footprint" basis.⁷⁸ Preferred continues to support this position and maintains that such allocation would provide Public Safety licensees with needed additional spectrum to develop

⁷⁴ Southern Communications Services, Inc., Ex Parte Presentation, June 21, 2004, at pp. 11-15.

⁷⁵ *Id.*, at pp. 13-16. See also *Report and Order*, at ¶ 325 & n. 743.

⁷⁶ Nextel Communications, Inc., Ex Parte Presentation, September 16, 2004, at p.2; and Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Slide 6.

⁷⁷ See *Report and Order*, at ¶ 153.

⁷⁸ See Preferred March Ex Parte, at p. 45.

interoperability. Preferred therefore opposes Nextel's request for "clarification" or the relocation of SMR, BILT and Public Safety Site licenses within Channels 121-150.

Nextel also requested "clarification" that incumbent Non-ESMR EA licensees' EA- and Site-Licensed Spectrum on Channels 1-120 (other than Nextel and Southern) would be retuned to comparable channels below 861.4 MHz, i.e., they will receive comparable channel availability and interference protection from high-density cellular operators.⁷⁹ Nextel's suggested "clarification" is a recitation of the Consensus Parties' Proposal as enhanced by Nextel in certain of its June 2004 Ex Parte filings.⁸⁰ Preferred already has addressed the legal, practical and mathematical problems resulting from such impermissible discriminatory treatment at length above and in its Ex Parte Presentations filed on March 2, 2004 and April 23, 2004.⁸¹ For the sake of brevity, Preferred hereby incorporates these Ex Parte Presentations and their Exhibits by reference.⁸²

Nextel's "clarification" seeks to revive the discredited Cellular Deployment Test that the Consensus Parties' Proposal employed to (1) separate the EA- and Site-Licensed Spectrum of the Nextel Control Group and Non-Nextel Control Group EA licensees and (2) move only the NCG's (and, to a limited extent, Southern's) EA- and Site-Licensed Spectrum to the Cellular Block on an EA market wide, Clean and 1:1 basis. Instead of limiting the movement of Non-Nextel EA licensees' EA- and Site-Licensed Spectrum into the new Cellular Block to their geographical "footprint" as proposed by the Consensus Parties, in its Ex Parte Presentation filed on September 16, 2004 Nextel reaffirms the position it adopted in its June Ex Parte Presentations that such movement should be limited to the number of the Non-Nextel EA licensees' Clean or MHz/Pops Equivalent Channels. Nextel thus advocates that the winners of FCC Auction #34, such as Preferred, should lose Total Channels in its EA markets while the losers of such Auction in those EA markets such Nextel or Nextel Partners would gain a considerable number of Total, Clean and Cellular-Service Eligible Spectrum. Under Nextel's proposed "clarification," the Non-Nextel EA licensees holding General Category EA-Licensed Spectrum effectively would be forced to transfer both spectrum (Total Channels) and spectrum rights⁸³ to the Nextel Control Group and, unlike the members of

⁷⁹ See Nextel Communications, Inc., Ex Parte Presentation, September 16, 2004, at p. 2; and Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Slide 6.

⁸⁰ See Nextel Communications, Inc., Ex Parte Presentation, June 4, 2004; Nextel Communications, Inc., Ex Parte Presentation, June 8, 2004, at pp. 6-8; Nextel Communications, Inc., Ex Parte Presentation, June 14, 2004, at pp. 4-7.

⁸¹ See Preferred Communication Systems, Inc., Ex Parte Presentation, March 2, 2004, at pp. 23-29; & 41-45; Preferred Communication Systems, Inc., Ex Parte Presentation, April 23, 2004, at p. 3-7. See also Southern Communications Services, Inc., Ex Parte Presentation, June 23, 2004, at pp. 11-16.

⁸² For Nextel Communications, Inc.'s responses to Preferred's criticism of the Consensus Parties Proposal's impermissible discriminatory treatment of Non-Nextel EA licensees, see Nextel Communications, Inc., Ex Parte Presentation, March 19, 2004.

⁸³ See 47 C.F.R. § 90.683; and Preferred March Ex Parte, at pp. 25-27, 29-35 and 41-43.

such Group, not receive value-for-value for such contribution.⁸⁴ Preferred maintains that the constitutional and statutory infirmities of the Consensus Parties Proposal's impermissible discriminatory treatment of Non-Nextel EA licensees apply to Nextel's proposed "clarification."⁸⁵ For all of the reasons set forth above, Preferred opposes Nextel's proposed clarification.

On October 8, 2004, Southern filed an *ex parte* presentation seeking a clarification that the restrictions associated with the Expansion Band in the Atlanta, Georgia EA market (812.5-813.5 MHz/857.5-858.5 MHz) are inapplicable due to the considerable number of Non-Nextel and Non-Southern SMR, BILT and Public Safety Site licenses that would be relocated to the Interleave Channels in this EA market.⁸⁶ Preferred maintains that Southern's filing reinforces the practical and even mathematical difficulties encountered by the *Report and Order* set forth above. Moreover, Southern's filing ignores the fifty-four (54) Non-Nextel Site licenses in the Upper 200 Channels in the Atlanta, Georgia EA market that also arguably should be relocated to the Interleave Channels.⁸⁷ A review of the FCC's license database as of June 30, 2004, confirms Southern's analysis.⁸⁸ Preferred therefore supports Southern's proposed clarification to the *Report and Order*.

On September 23, 2004, AirPeak Communications, LLC filed an *ex parte* presentation seeking clarification that it may elect to relocate its EA- and qualifying Site-Licensed Spectrum to the former NPSPAC Channels (821-824 MHz/866-869 MHz) within the new Cellular Block since such election would not:

- (1) increase the cost of retuning their systems;
- (2) delay the retuning process; and
- (3) not adversely impact the ongoing operations of either Nextel or public safety entities.⁸⁹

As discussed above, the *Report and Order*'s movement methodology fails on practical and even mathematical grounds due to the considerable number of Non-Nextel SMR, BILT and Public Safety Site licenses that need to be relocated from Channels 1-150 and, if the *Report and Order*'s rationale for rebanding is to be applied consistently, such licenses in Channels 401-600,⁹⁰ to the Interleave Channels.⁹¹ Moreover, if the Transition Administrator and the Commission choose not to relocate Non-Nextel SMR,

⁸⁴ See *Report and Order*, at ¶¶ 5, 12, 31-34, 85, 213-216 and 278-324.

⁸⁵ See Preferred March Ex Parte, at pp. 41-43.

⁸⁶ See Southern Communications Services, Inc., Ex Parte Presentation, October 8, 2004.

⁸⁷ See n. 9 *supra*.

⁸⁸ See Non-Nextel SMR, BILT and Public Safety Licenses in Channels 1-150 and Channels 401-600 attached hereto as **Schedule 2** to the *CTO Report*.

⁸⁹ See AirPeak Communications, LLC, Ex Parte Presentation, September 23, 2004, at pp. 3-4.

⁹⁰ See n. 9 *supra*.

⁹¹ See n. 85 *supra*.

BILT and Public Safety licenses from the Upper 200 Channels, in forty (40) EA markets in which 64.28 million persons reside, Nextel or Nextel Partners lack sufficient Clean Upper 200 Channels Spectrum to accommodate the relocation of Non-Nextel EA and Cellular-Architecture System licensees absent application of the pro rata distribution approach.⁹² Preferred therefore supports AirPeak Communications, LLC's proposed clarification.

Preferred would expand AirPeak Communications, LLC's proposed clarification. As discussed below, Preferred maintains that all Non-Nextel EA and Cellular-Architecture System licensees should be afforded a second election to move their respective EA- and qualifying Site-Licensed Spectrum to either the

- (1) former NPSPAC Channels; or
- (2) Upper 200 Channels

within the new Cellular Block on an EA market Clean and 1:1 basis.⁹³

Such approach generally would require fewer re-tunings, less time and less expense than the approach advocated by Nextel and adopted by the FCC in the *Report and Order*.⁹⁴ As noted by AirPeak Communications, LLC, moving the General Category EA-Licensed Spectrum of Non-Nextel EA licensees to the former NPSPAC Channels will minimize the costs Nextel and Nextel Partners will incur in modifying their respective networks.⁹⁵

⁹² See Nextel Control Group Clean Spectrum Holdings In Channels 401-600 attached as **Schedule 3** to the *CTO Report*.

⁹³ If a Non-Nextel EA or Cellular-Architecture System licensee were to choose the first prong of such election, Channels 1-30 of its General Category EA Authorizations would be retuned to Channels 571-600 in the Upper 200 Channels, if held by Nextel or Nextel Partners in a particular EA market and thus available to be vacated and Channels 31-150 of its General Category EA Authorizations would be retuned to Channels 601-720 (as calculated on a 25 kHz bandwidth basis) in the former NPSPAC Channels, on an EA market wide Clean 1:1 basis. If, as in the Puerto Rico EA market, Channels 576-600 in the Upper 200 Channels were not held by Nextel or Nextel Partners and therefore were unavailable, the Non-Nextel EA licensee's Channels 1-30 if its General Category EA Authorizations would be relocated to the 1.9 GHz Band spectrum in that EA market on an EA market Clean and 1:1 basis.

⁹⁴ See AirPeak Communications, LLC, Ex Parte Presentation, September 23, 2004, at pp. 3-4.

⁹⁵ See Nextel Communications, Inc., Ex Parte Presentation, June 14, 2004, at p. 5 & n. 17; Nextel Communications, Inc., Ex Parte Presentation, September 16, 2004, at p. 2; and Nextel Communications, Inc. Ex Parte Presentation, September 21, 2004, at Slide entitled "'Nextel's Retuning Costs.'"

D. Preferred's Improvements

In March 2004, Preferred proposed certain modifications to the Consensus Parties' Proposal.⁹⁶ Unlike the Consensus Parties' Proposal or the approach adopted by the Commission in the *Report and Order*, Preferred's rebanding approach maintains the spectrum and spectrum rights of all Non-Nextel EA and Cellular-Architecture System licensees.

As noted above, with respect to General Category EA-Licensed Spectrum, a Non-Nextel EA licensee would have a second election with respect to the Channels within the new Cellular Block to which its Channels would be relocated.

With respect to Lower 80 EA-Licensed Spectrum, a Non-Nextel EA licensee would have a second election pursuant to which its Channels would be relocated either to the

- (1) Upper 200 Channels beginning with Channel 600 and moving downward; or
- (2) 1.9 GHz Band spectrum

on an EA market Clean and 1:1 basis.

With respect to Site-Licensed Spectrum held by either a Non-Nextel EA or Cellular-Architecture System licensee, Preferred maintains that such licensee should be afforded an election to move its Site Channels to the Cellular Block on an EA market Clean and 1:1 basis if it constructs such Channels as part of a Cellular-Architecture System by the construction deadline afforded Nextel and Nextel Partners for their respective unconstructed Site-Licensed Spectrum.⁹⁷ No justification was provided by the FCC in the *Report and Order* for its discriminatory treatment of Non-Nextel EA and Cellular-Architecture System licensees' Site-Licensed Spectrum. Preferred maintains that no lawful distinctions can be made by the Commission between the Site-Licensed Spectrum held by the NCG and Non-Nextel EA and Cellular-Architecture System licensees justifying different treatment for purposes of 800 MHz rebanding.

II. Allocation of 1.9 GHz Band Spectrum

A. *Report and Order*

The FCC rejected the Consensus Parties Proposal's exclusive allocation to Nextel of a nationwide 10 MHz license in the 1.9 GHz Band in exchange for its vacating a nationwide average of approximately 2.5 MHz in the 800 MHz Band, 4 MHz in the 700 MHz Guard Band and 4 MHz in the 900 MHz Band and its promise to pay up to \$850

⁹⁶ See Preferred March Ex Parte, at p. 45.

⁹⁷ See Nextel Partners, Inc., Form 10-K for the period ended December 31, 2003, at pp. 20-21.

million to defray total 800 MHz Band relocation costs since it perceived that such approach provided an insufficient benefit to Public Safety licensees and spectrum of less than comparable value to that of the 1.9 GHz Band spectrum Nextel would be granted.⁹⁸ Instead, the Commission exclusively allocated Nextel 1.9 GHz Band Spectrum on a “value-for-value” exchange basis.⁹⁹

The Commission initially determined that the value of the 1.9 GHz Band spectrum it would award Nextel was \$1.70 per MHz/Pop or \$4.86 billion.¹⁰⁰ The FCC then determined that the value of the 4.5 MHz of 800 MHz Band spectrum Nextel was vacating¹⁰¹ was \$1.526 per MHz/Pop.¹⁰² Multiplying such figure by the 4.5 MHz of 800 MHz Band spectrum to be vacated and Nextel’s 234 million licensed Pops, the Commission determined that the value of such spectrum was \$1.607 billion.¹⁰³ The FCC then added the amount of Nextel’s projected \$827 million relocation costs and the \$527 million cost of the UTAM and BAS licensee 1.9 GHz Band spectrum relocation costs.¹⁰⁴ Unable to determine the probable amount of the total 800 MHz Band relocation costs, the Commission required Nextel to provide a \$2.5 billion irrevocable letter of credit to secure its promise to pay all reasonable 800 MHz Band relocation costs.¹⁰⁵ Finally, to ensure that Nextel would not receive a spectrum “windfall” the FCC imposed an Anti-Windfall payment of the difference between the \$4.86 billion value of the 1.9 GHz Band spectrum Nextel would receive and its costs in reconfiguring the 800 MHz band and clearing the 1.9 GHz Band.¹⁰⁶

A considerable part of the difficulty encountered by the FCC in fitting all of the EA- and Site-Licensed Spectrum held by the Nextel Control Group and Non-Nextel EA licensees into the ESMR portion of the band, which led to its adoption of the *pro rata* distribution approach, is the FCC’s separation of 800 MHz rebanding from its exclusive allocation to Nextel of 10 MHz of 1.9 GHz band spectrum by a private sale. The Commission could have based its allocation of such spectrum upon its Section 316 modification authority by moving the General Category and Lower 80 EA- and Site-Licensed Spectrum held by EA licensees and the BILT Channels held by EA licensees that previously had been converted to CMRS according to the type of license held rather than upon the identity of the licensee. The problem with this approach advocated by

⁹⁸ See *Report and Order*, at ¶¶ 32, 212 and 278.

⁹⁹ See *id.*

¹⁰⁰ See *id.*, at ¶ 297.

¹⁰¹ See *id.*, at ¶ 307.

¹⁰² See *id.*, at ¶ 323.

¹⁰³ See *id.*

¹⁰⁴ See *id.*, at ¶¶ 303-304. The BAS licensee relocation costs would be reduced by any MSS-reimbursed expenses incurred prior to the end of the thirty-six (36) month reconfiguration period when offsets will be calculated.

¹⁰⁵ See *id.*, at ¶¶ 182-187, 325 and 329-332.

¹⁰⁶ See *id.*, at ¶¶ 12 and 212.

Preferred and other Non-Nextel EA licensees was that Nextel apparently was unwilling to share 1.9 GHz band spectrum.¹⁰⁷

Instead, the *Report and Order* separates the Nextel Control Group's EA- and Site-Licensed Spectrum from that of Non-Nextel EA and Cellular-architecture System Site licensees. As noted above, it then substitutes a "value-for-value" approach to the exclusive allocation of 10 MHz of 1.9 GHz band spectrum to Nextel for the "kHz-for-kHz" approach advocated by the Consensus Parties' Proposal. The Commission's approach clearly was intended to answer Verizon Wireless' challenge to the FCC's legal authority to award Nextel a nationwide 10 MHz license in the 1.9 GHz band under the Anti-Deficiency Act¹⁰⁸ and Miscellaneous Receipts Act.¹⁰⁹ However, by establishing a \$4.8 billion fair market value "price tag" for the 1.9 GHz band spectrum, the Commission clearly converted a modification of Nextel's 800 MHz Spectrum for which it has authority under Section 316 to a private sale of 1.9 GHz band spectrum clearly contravening the mandatorily applicable competitive bidding provisions of Section 309(j).¹¹⁰

In the *Report and Order* the FCC maintains that Section 309(j) is inapplicable since the award of a nationwide 10 MHz license in the 1.9 GHz band to Nextel does not represent such a major modification of its 800 MHz Interleave and Lower 80 EA and Site Channels to be vacated as to be considered the issuance of an "initial license."¹¹¹ The

¹⁰⁷ See Nextel Communications, Inc., Ex Parte Presentation, March 19, 2004, p. 1 & n. 2.

¹⁰⁸ The Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(B).

¹⁰⁹ The Miscellaneous Receipts Act, 31 U.S.C. § 3302(b).

¹¹⁰ Unlike the authorities cited and relied upon by the FCC in determining that it has the Section 316 modification authority to allocate a nationwide 10 MHz license in the 1.9 GHz band, the Commission already has allocated the 1.9 GHz band spectrum for commercial services and indicated the desirability of using this Spectrum for advanced wireless service. See *Report and Order*, at ¶¶ 65-68; Cellular Telecommunications & Internet Association, Ex Parte Presentation, December 4, 2003, p. 12; *Verizon Wireless, White Paper*, at pp. 10-11.

¹¹¹ See *Report and Order*, at ¶¶ 72-73 and n. 236. The Commission refers to *California Metro Mobile Communications v. FCC*, 365 F.3d 38, 45 (D.C. Cir. 2004) as support for the proposition that it may move licensees on a service-wide basis without license-by-license consideration. See *Report and Order*, at ¶ 65 & n. 214. The FCC would be correct if it had chosen to adopt a movement methodology based upon the type of license held. Instead, in its *Report and Order*, it bases such movement methodology upon the identity of the licensee and impermissibly discriminates between the EA- and Site-Licensed Spectrum held by the Nextel Control Group and that held by the Non-Nextel Control Group EA and Cellular-Architecture System Site Licensees both with respect to movement within the 800 MHz band and the allocation of 1.9 GHz band spectrum. In determining whether such discrimination is justified, a reviewing court necessarily will consider the *Report and Order*'s movement of 800 MHz band licenses held by these two groups and its exclusive allocation of 1.9 GHz band spectrum to Nextel on a license-by-license basis.

Commission then determines that even if Nextel's spectrum rights and responsibilities resulting from the FCC's award of 1.9 GHz band spectrum awarded were so different from those of its 800 MHz band spectrum to be vacated that such award of 1.9 GHz band spectrum should be considered the grant of an initial license, it has the authority under Section 316 to avoid mutual exclusivity when it determines that such avoidance serves the public interest, convenience and necessity.¹¹² As support for this position, the FCC cited Section 309(j)(6)(E)¹¹³ and the Conference Report concerning the 1997 Balanced Budget Act.¹¹⁴ According to the FCC, Section 309(j)(6)(E) provides it with broad authority to create or avoid mutual exclusivity in licensing depending upon the Commission's assessment of the public interest.¹¹⁵

The Commission's argument suffers from several factual and legal infirmities. First, the 10 MHz nationwide license in the 1.9 GHz band to be awarded clearly differs in significant ways from the Lower 80 EA and Site Channels and BILT Channels exchanged therefor:

- A nationwide "running" average of 5.5 MHz of the 1.9 GHz band spectrum would represent new and additional spectrum;
- No service rules have been promulgated for the 1.9 GHz band spectrum; FCC likely would follow the service rules promulgated under Part 27 of its Rules which differ from the service rules applicable to Nextel's 800 MHz band spectrum;
- Nextel would be awarded a single nationwide license in exchange for its 800 MHz EA- and Site-Licensed Spectrum in one hundred four (104) EA markets;
- Nextel would be awarded a nationwide license even though it holds no 800 MHz band spectrum in seventy-one (71) EA markets in which 43 million persons live and work;¹¹⁶
- Nextel would be awarded Clean and Contiguous Spectrum even though the nationwide "running" average of 4.5 MHz of 800 MHz band spectrum is largely encumbered by EA Authorizations and Site licenses held by nonaffiliated entities; and

¹¹² See *id.*, at ¶ 73 and n. 237.

¹¹³ 47 U.S.C. § 309(j)(6)(E).

¹¹⁴ H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 572 (1997); 1997 U.S. Code Cong. & Admin. News, p. 192; see also Commission's Rules Regarding Multiple Address Systems, *Report and Order*, 15 FCC Rcd 11956, 11962-63 (2000); *DirectTV, Inc. v. FCC*, 100 F.3d 816, 828 (D.C. Cir. 1997); cf. *Benkelman Telephone Co. v. FCC*, 220 F.3d 601, 605-606 (D.C. 2000). *Contra Verizon Wireless White Paper*, at pp. 15-16.

¹¹⁵ See *Report and Order*, at ¶ 73 & n. 237.

¹¹⁶ See Preferred Communication Systems, Inc., Ex Parte Presentation, March 2, 2004, **Exhibit F**. Nextel Partners also holds 800 MHz spectrum in several EA markets in which Nextel holds 800 MHz spectrum covering the majority of the total population. Nextel Partners' spectrum in these EA markets covers a total of 10 million Pops. See also Nextel Partners, Inc. Form 10-K for the period ended December 31, 2003, pp. 7-8.

- Nextel would be awarded such Clean and Contiguous Spectrum even though a considerable portion of its 800 MHz band spectrum is Site- Licensed Spectrum with a small grouping of frequencies and limited geographic and population coverage.¹¹⁷

Second, assuming *arguendo*, as does the Commission, that the award of the 10 MHz nationwide license in the 1.9 GHz band involves the issuance of an initial license,¹¹⁸ the FCC clearly no longer could rely upon its Section 316 modification authority to restrict participation in such spectrum allocation to Nextel. In such event, the Commission could look only to Section 309(j)(6)(E) as authority for its avoiding mutual exclusivity and the competitive bidding provisions of Section 309(j). However, a reading of the legislative history of this section indicates that it was meant to encourage the FCC in certain situations to accommodate all parties seeking access to a particular block of spectrum¹¹⁹ where such an arrangement would better serve the public interest, convenience and necessity. This paragraph was added to Section 309 to address the concerns of companies interested in obtaining MSS or Big LEO authorizations that the new competitive bidding provisions would disrupt the MSS rulemaking proceeding. The paragraph was intended to eliminate their opposition to auctions by its encouragement of the Commission to specifically seek an arrangement to avoid mutually exclusive applications in the MSS or Big LEO proceeding.¹²⁰

As noted above, the FCC contends that Section 309(j)(6)(E) provides it with broad discretionary authority to avoid mutual exclusivity based upon its determination of the public interest.¹²¹ However, based upon this section's legislative history, such discretion is limited to determining whether it would better serve the public interest to

¹¹⁷ Under previous FCC decisions, the conversion of the Nextel Control Group's Site-Licensed Spectrum into a single nationwide 10 MHz PCS license in the 1.9 GHz band is by itself the award of an initial license triggering the competitive bidding requirements of Section 309(j). See *Verizon Wireless White Paper*, at pp. 11-12; see also *Verizon Wireless, LLC, Ex Parte Presentation*, June 10, 2004, p. 7. The award of a nationwide license would be considered an initial license under the Commission's rules since it clearly would be a "major modification." Under such Rules, a licensee's request "to add a frequency or frequency block for which the applicant is not currently authorized" is considered a "major modification." 47 C.F.R. § 1.929(a)(6). The Commission has long regarded such a "major modification" as the equivalent of an "initial license" that is subject to the competitive bidding provisions of Section 309(j) since such changes are "analogous to applications for construction permits for new stations" and because of "the absence of another viable method for resolving instances of mutual exclusivity in a timely and efficient manner." Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast And Instructional Fixed Service Licenses, *First Report and Order*, 13 FCC Rcd 15920, 15925-26 (1998).

¹¹⁸ See *Verizon Wireless White Paper*, at pp. 11-12 & n. 49.

¹¹⁹ See *id.*, at p. 16; H.R. Rep. No. 103-111, at 258-59 (1993).

¹²⁰ See *id.*

¹²¹ See *Report and Order*, at ¶ 73 and n. 236.

allocate spectrum to a class of licensees on a *pro rata* or settlement basis or by a public auction.¹²² None of the authorities cited by the FCC, including the *MSS L-Band Order*, authorize it to award an initial license to a single entity, particularly where, as here, the Commission already has allocated the spectrum in question for advanced commercial service.

The FCC contends that it has the authority to establish threshold qualifications and limit eligibility to apply for a license where it finds that such restricted access serves the public interest, convenience and necessity.¹²³ However, most analysts and subsequent court decisions have found that the U.S. Supreme Court's decision in *Storer Broadcasting*,¹²⁴ the case relied upon by the Commission, authorizes the FCC to do more than establish reasonable licensee qualification standards.¹²⁵ The FCC can establish rules that all licensees may be required to satisfy. It cannot, as it does in the *Report and Order*, establish the licensee by rule.¹²⁶

Finally, the Commission argues that mutual exclusivity does not exist since it has not authorized the filing of applications for this spectrum, has never proposed to do so, and for reasons set forth in the *Report and Order* conclude that it is not in the public interest to open the spectrum for the filing of competitive applications.¹²⁷ However, the FCC cannot avoid its statutory obligation to maintain regulatory parity and promote competition¹²⁸ and allocate licenses for advanced commercial service by a competitive

¹²² See *Verizon Wireless White Paper*, at p. 15; see also Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and 1.6/2.4 GHz Bands, *Report and Order and Notice of Proposed Rulemaking*, IB Docket No. 01-185, 18 FCC Rcd 1962, 2070 at ¶ 225 & n. 591 (2003) (“*MSS/ATC Order*”); Establishing Rules and Policies for the Use of Spectrum for Mobile Satellite Services in the Upper and Lower L-Band, *Notice of Proposed Rulemaking*, IB Docket No. 96-132, 11 FCC Rcd 11675, 11685, at ¶¶ 23-24 (1996) (“*MSS L-Band NPRM*”); Report and Order, 17 FCC Rcd 2704 (2002) (“*MSS L-Band Order*”); Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band for Fixed Service, ET Docket No. 97-99, 12 FCC Rcd 4990 (1997), *recon. denied*, 13 FCC Rcd 15147 (1998) (“*DEMS Order*”).

¹²³ See *Report and Order*, at ¶ 74 & n. 239.

¹²⁴ *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956).

¹²⁵ See, e.g., *Committee For Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1315 (D.C. Cir. 1995); *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 459-460 (D.C. Cir. 1991); *Telocator Network of America v. FCC*, 691 F.2d 525 (D.C. Cir. 1982).

¹²⁶ *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1315 (D.C. Cir. 1995); *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 460 (D.C. Cir. 1991); *New South Media Corp. v. FCC*, 685 F.2d 708, 709-711, 715-716 (D.C. Cir. 1982).

¹²⁷ See *Report and Order* at ¶ 71.

¹²⁸ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 6002(d) (3) (B), 107 Stat. 397 (1993)(mandating that Commission establish a uniform regulatory regime for all commercial mobile services); 47 U.S.C. § 309(j)(3)(B) & (4)(C); 47 U.S.C. § 257; see *Verizon Wireless White Paper*, at pp. 14-15.

bidding procedure simply by awarding Nextel the 1.9 GHz band spectrum pursuant to a private sale.¹²⁹

Many investment banking firm analysts recognize that an award of 1.9 GHz band spectrum to Nextel would represent a significant spectrum enhancement.¹³⁰ According to some of these analysts, such spectrum award would be a “transforming event” for Nextel allowing it to construct a cdma-based 3G network for voice and data or a high speed data network using Flarion Technologies, Inc.’s OFDM technology.¹³¹

Preferred and twenty-seven (27) other licensees share EA-Licensed Spectrum with Nextel or Nextel Partners in one hundred nineteen (119) EA markets. Discriminatory treatment of the Non-Nextel Control Group EA licensees by modifying their EA-Licensed Spectrum differently than that of Nextel’s and excluding them from eligibility to (1) file modification applications for such 1.9 GHz band spectrum in certain EA markets and (2) purchase a portion of such Spectrum in these and other EA markets would violate the Commission’s statutory obligation to ensure regulatory parity among Nextel, Nextel Partners and the Non-NCG EA licensees.¹³² According to Nextel, “[r]egulatory parity is a fundamental requirement established by Congress in the Omnibus Budget Reconciliation Act of 1993 (‘1993 Act’).”¹³³ The 1993 Act created the CMRS regulatory classification and expressly directed the FCC to modify its rules for common carrier and private mobile radio services “establish regulatory symmetry among mobile services.”¹³⁴ In enacting this legislation, Congress’ intent was “to create a level

¹²⁹ See *Verizon Wireless White Paper*, at p. 11 & nn. 45-46.

¹³⁰ See *id.*

¹³¹ See *Nextel Sees Resolution of Spectrum Plan in 70 Days*, Reuters Online article, October 6, 2004 (“Nextel has said in the past that a resolution of interference problems with public safety networks would help it develop plans for high-speed mobile Internet services. Donahue told investors on Wednesday that he expects Nextel to decide by the beginning of next year which technology it will use for such services. He said the company could have a national high-speed network built by the end of 2006. By this time it could deliver media content over its networks and could also partner with cable television operators looking to get into telecommunications.”) Although Nextel refers to the FCC’s statutory requirement to maintain regulatory parity only in terms of the Commission’s providing equal regulatory treatment with respect to the cellular and PCS carriers and itself, such statutory obligation in this context clearly encompasses the class of licensees whose EA- and Site-Licensed Spectrum is to be relocated and thereby modified. See, e.g., Nextel Communications, Inc., Supplemental Response, May 7, 2004, at pp. 10, 13, 17-18; Nextel Communications, Inc., Comments, May 6, 2002, at pp. 12-13; Southern Communications Services, Inc., Ex Parte Presentation, June 23, 2004, at pp. 3 & n. 6, 11-12 & n. 48, and 15-16.

¹³² Southern Communication Services, Inc., Ex Parte Presentation, June 23, 2004, at p. 18.

¹³³ CMRS Third Report and Order, at ¶ 1.

¹³⁴ *Id.*, at ¶ 11. See also H.R. Rep. No. 103-111 (1993)(1993 Act “directs the Commission to review its rules and regulations to achieve parity among services that are

regulatory playing field for CMRS.”¹³⁵ As the Commission has determined, the “broad goal of this [legislation] is to ensure that economic forces—not disparate regulatory burdens—shape the development of the CMRS marketplace.”¹³⁶ According to Nextel the 1993 Act “directed the Commission to ensure that all CMRS licensees, including cellular-like SMR licensees, cellular licensees and PCS licensees, are subject to the same rules and regulations, including geographic area licensing and a level regulatory playing field.”¹³⁷ Further, as Nextel has stated, pursuant to the 1993 Act the FCC has auctioned geographic area overlay licenses in the 800 MHz Land Mobile Radio Band. In doing so, the Commission expressly stated that such licenses could be used to operate “multiple base station, wide-area ‘cellular-type’ commercial radio networks in competition with cellular and PCS operators.”¹³⁸

Like Nextel and Nextel Partners, Preferred is seeking an allocation of 1.9 GHz band spectrum so that it might increase its spectrum capacity, improve the cost efficiency of the network it will deploy over the next 2-3 years and offer a fixed high-speed broadband wireless service. Holding the same type of licenses as these companies, Preferred is seeking the same opportunity to compete on an equal basis in the marketplace against cellular and PCS operators. Preferred contends that the FCC is required by the statutory mandates to promote regulatory parity and promote diversity of license ownership and competition among commercial SMR licensees and operators to open up participation in the allocation of 1.9 GHz band spectrum to all General Category and Lower 80 EA licenses whose authorizations are being moved and modified.¹³⁹

substantially similar. In addition, the legislation establishes uniform rules to govern the offering of all commercial mobile services.”); *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 970 (D.C. Cir. 1999).

¹³⁵ *Id.*, at ¶ 4.

¹³⁶ Nextel Communications, Inc., Comments, May 6, 2002, at p. 12. *See also*, Southern Communications Services, Inc., Ex Parte Presentation, June 23, 2004, at p. 3 & n. 6.

¹³⁷ *Id.*

¹³⁸ *See* Preferred Communication Systems, Inc., Ex Parte Presentation, April 23, 2004, at p. 7. *See also*, Southern Communications Services, Inc., Ex parte Presentation, June 23, 2004, at p. 5 (“Regulatory parity is even more applicable to providers within a single service, such as Nextel, Nextel Partners, and Southern LINC. Thus, Nextel, Nextel Partners, Southern LINC and other CMRS entities should receive comparable regulatory treatment.”); Nextel Communications, Inc., Comments, May 6, 2002, at p. 12 (1993 Act “directed the Commission to ensure that all CMRS licensees, including cellular-like SMR licensees, cellular licensees, and PCS licensees, are subject to the same rules and regulations, including geographic area licensing and a level regulatory playing field.”)

¹³⁹ *See* Preferred Communication Systems, Inc., Ex Parte Presentation, April 23, 2004, at p. 7. *See also* Southern Communications Services, Inc., Ex Parte Presentation, June 23, 2004, at p. 5 (“Regulatory parity is even more applicable to providers within a single service, such as Nextel, Nextel Partners and Southern LINC. Thus, Nextel, Nextel Partners, Southern LINC and other CMRS entities should receive comparable regulatory treatment.”); Nextel Communications, Inc., Comments, May 6, 2002, at p. 12 (1993 Act “directed the Commission to ensure that all CMRS licensees, including cellular-like SMR

Preferred maintains that if the FCC uses the EA market boundaries and moves the EA-Licensed Spectrum of Nextel, Nextel Partners and the Non-Nextel EA and Cellular-architecture System Site licensees in the same way based upon the type of license held as contrasted with how a particular licensee presently operates its spectrum or the identity of the licensee it clearly has the Section 316 modification authority to allocate 10 MHz or more of 1.9 GHz band spectrum to the class of licensees including all of the General Category and Lower 80 EA licensees.¹⁴⁰ Since 5.5-10 MHz or more of the 1.9 GHz band spectrum to be awarded in one of these EA markets would be replacement spectrum and such award arguably would neither be significantly different from or greater than the spectrum modified that it should be considered the award of an initial license under the *Fresno Mobile Radio* decision, the Commission's rules or the *Competitive Bidding Second Report and Order*. Moreover, Section 309(j)(6)(E) would be applicable since the FCC would be providing a solution that would accommodate the replacement spectrum of all members of the class of licensees affected—the General Category and Lower 80 EA licensees whose authorizations are being moved and modified by the FCC.

In applying Section 309(j)(3)(C)'s directive that the FCC should consider whether the award of a particular license or set of licenses outside the competitive bidding provisions of Section 309(j) would unjustly enrich the licensee, the FCC necessarily compares the value of the replacement spectrum to that vacated or returned. For the reasons discussed above, the *Report and Order* would in many EA markets clearly provide Nextel with spectrum reasonably valued at a much greater amount than its 800

licensees, cellular licensees, and PCS licensees, are subject to the same rules and regulations, including geographic area licensing and a level regulatory playing field.”)

¹⁴⁰ Both Nextel and the FCC apparently recognize that adoption of such an approach would provide it with the legal authority lacked by the Enhanced Consensus Parties' Proposal and the present version of the *Report and Order*. Based upon conversations between certain representatives of A.R.C., Inc. and WTB staff members, the Commission intends to allocate 1.9 GHz band spectrum in each of the 175 EA markets as replacement spectrum for the already existing 800 MHz band spectrum to be vacated in those EA markets by either Nextel or Nextel Partners. Nextel Partners, Inc. would be allocated 1.9 GHz band spectrum in the seventy-one (71) EA markets in which it, rather than Nextel, holds 800 MHz band spectrum in excess of such replacement spectrum for its agreement to pay its own relocation costs. Such approach would buttress the Commission's contention that the award of 1.9 GHz band spectrum would not involve the issuance of “initial” licenses triggering the otherwise mandatorily applicable competitive bidding provisions of Section 309(j) and thus minimize the litigation risk posed by the anticipated legal challenge from Verizon Wireless. However, unless such approach also includes the Non-Nextel Control Group EA licensees, it necessarily will violate the Commission's statutory mandates to maintain regulatory parity and promote competition. *See Report and Order*, at ¶¶ 325 & n. 743, 326, 345, 347, 353 and 357. *Contra, Report and Order*, at ¶¶ 12 and 34. *See also* Preferred Communication Systems, Inc., March Ex Parte, March 2, 2004, at pp. 49-50; Preferred Communication Systems, Inc., Ex Parte Presentation, April 23, 2004, at pp. 5-7.

MHz band spectrum to be vacated.¹⁴¹ In the twenty-eight (28) EA markets in which Nextel holds all of the EA-Licensed Spectrum, the Consensus Parties' Proposal and Nextel's recent modification would grant it a geographical portion of nationwide 10 MHz as replacement spectrum. In these markets the value of Nextel's replacement spectrum would not be considered significantly greater than it surrendered in such spectrum exchange.

However, in the seventy-one (71) EA markets in which Nextel holds no 800 MHz band spectrum and in the one hundred eighteen (118) such markets in which Nextel Partners (42 EA markets) or it (78 EA markets) shares EA-Licensed Spectrum with Non-Nextel Control Group EA licensees, the Commission's award of a geographic portion of a 10 MHz nationwide license in the 1.9 GHz band clearly would provide Nextel with spectrum far more valuable than the 800 MHz spectrum it would surrender. In seventy-one (71) of these markets, Nextel holds no 800 MHz band spectrum to be exchanged. To equalize the value of the spectrum to be exchanged, Nextel would be required to pay the "full" fair market value of the 1.9 GHz band spectrum, the amount the Commission reasonably could be received if it conducted a competitive auction. In certain of the one hundred eighteen (118) EA markets in which Nextel or Nextel Partners shares EA-Licensed Spectrum, the Consensus Parties' Proposal also would provide Nextel with 1.9 GHz band spectrum far more valuable than the 800 MHz band spectrum Nextel would surrender. To equalize the value of the spectrum to be exchanged, Nextel would be required to pay the "full" fair market value of the 1.9 GHz band spectrum. Of course, the problem with increasing the cash component in the EA markets in which Nextel lacks 800 MHz band spectrum or Nextel Partners or it shares EA-Licensed Spectrum with Non-NCG EA licensees is that it converts such spectrum modification into a private sale of 1.9 GHz band spectrum in these EA markets clearly triggering the competitive bidding provisions of Section 309(j).

Under Preferred's Improvements all General Category and Lower 80 EA licensees would receive replacement spectrum on a Clean 1:1 basis for their encumbered EA-Licensed Spectrum. As discussed above, such licensees' Site-Licensed Spectrum would be exchanged for EA market-wide frequencies on a MHz/Pops Equivalent basis. Given the amount of CMRS Cellular Service Eligible Spectrum moving and modified under all of the Rebanding Proposals presently under consideration by the FCC, a minimum of 5.5 MHz of 1.9 GHz or 2.1 GHz spectrum is needed to replace already-existing 800 MHz band spectrum. While such 1.9 GHz or 2.1 GHz spectrum may be more valuable than the encumbered 800 MHz band spectrum it would replace, it would not appear that such increase would be as great as that afforded MSS licensees by the Commission in the *MSS/ATC Order*.

Moreover, unlike previous proceedings involving the relocation of fixed microwave or MSS licensees to clear spectrum for its reallocation to commercial service, here SMR EA- and Site-licensees would be relocating their existing systems to replacement frequencies for the benefit of public safety and other systems presently

¹⁴¹ See *Verizon Wireless White Paper*, at p. 11 & nn. 45-46.

experiencing interference within the 800 MHz band. Under Preferred's Improvements certain of these EA licensees also would elect to forego reimbursement of their own relocation costs and contribute funds toward the total 800 MHz band relocation costs. These EA licensees would be afforded the opportunity to purchase 1.9 GHz spectrum in a particular EA market in excess of that needed to replace already-existing 800 MHz band spectrum. Given the above facts and the Commission's need to provide an incentive to EA licensees to pay at least a portion of the total 800 MHz band relocation costs, the FCC should determine that award of 1.9 GHz band spectrum licenses under Preferred's Improvements would not unjustly enrich the EA licensees in violation of Section 309(j)(3)(C)'s directive.

Unlike the Consensus Parties' Proposal, under Preferred's Improvements all General Category and Lower 80 EA licensees as a class would contribute more spectrally and financially than they would receive from an allocation of 1.9 GHz Band spectrum. As discussed above, such EA licensees would vacate an average of 13-13.5 MHz of 800 MHz band spectrum. 6 MHz of such spectrum would be replaced on a Clean 1:1 basis by 6 MHz in the new Cellular Block comprised of the former NPSPAC Channels. An average of 7-7.5 MHz of such spectrum would be replaced on a Clean 1:1 basis by 7-7.5 MHz in the 1.9 GHz band.

At \$1.526 per MHz/Pop¹⁴² the value of the 8.55 MHz of such spectrum to be vacated by the General Category and Lower 80 EA licensees as a class of licensees would have a value of \$3.809 billion.¹⁴³ In addition, Nextel, Preferred and other such EA licensees would forego a minimum of \$847 million in reimbursement of their own relocation costs and contribute up to \$1 billion to defray total 800 MHz band relocation costs and \$527 million in UTAM and BAS licensee relocation costs. The total spectral and financial contributions by all of the General Category and Lower 80 EA licensees as a class of licensees therefore would be \$6.183 billion.

¹⁴² This is the figure used by the Commission in the *Report and Order* for the 800 MHz Band spectrum to be vacated by Nextel. The total contribution by Nextel, Nextel Partners and the Non-Nextel Control Group EA licensees under Preferred's Improvements would be \$6.163 billion. Assuming that the value of the 1.9 GHz band spectrum is the \$1.70 per MHz/Pop figure determined by the Commission in the *Report and Order*, these licensees therefore would contribute \$1.199 billion more in spectral and financial contributions than they would receive in exchange therefor. See *Report and Order*, at ¶¶ 35, 297 and 323.

¹⁴³ The Non-Nextel Control Group EA licensees hold a nationwide average of forty (40) Channels, or 2 MHz of General Category and Lower 80 EA-Licensed Spectrum that would move and need to be replaced on a Clean 1:1 basis in the new Cellular Block. Assuming that such licensees' Site-Licensed Spectrum (including the B/ILT Channels held by Southern) also move into the new Cellular Block, the average spectrum figure and value would increase accordingly.

As noted above, the FCC calculated that the value of such 1.9 GHz band spectrum to be received would be \$1.70 per MHz/Pop or \$4.860 billion.¹⁴⁴ The General Category and Lower 80 EA licensees as a class of licensees therefore would contribute \$1.323 billion more in spectral and financial contributions than they would receive in exchange therefor. Under Preferred's Improvements the General Category and Lower 80 EA licensees therefore clearly could not be considered to have received an undue benefit or be unjustly enriched in violation of Section 309(j)(3)(C).

B. Nextel's Request for Clarification

In an *ex parte* presentation filed on September 21, 2004, Nextel requested that the Commission clarify the *Report and Order* with respect to its calculation of the value of Nextel's spectral contribution.¹⁴⁵ Although not entirely clear from its *ex parte* presentation, Nextel apparently is seeking credit for the value of the 800 MHz Band spectrum to be vacated by Nextel Partners, Inc.¹⁴⁶ Preferred maintains that Nextel's request confirms the legal infirmity of the *Report and Order*'s exclusive allocation of 1.9 GHz Band spectrum to Nextel. If the Commission allocates the 1.9 GHz Band spectrum to Nextel in the seventy-one (71) EA markets in which it holds no 800 MHz Band spectrum, such award of spectrum clearly is pursuant to a private sale rather than a modification of its already existing 800 MHz Band spectrum.¹⁴⁷ On the other hand, if the FCC allocates the 1.9 GHz Band as replacement spectrum for the already-existing 800 MHz Band spectrum held by Nextel or Nextel Partners in the one hundred seventy-five (175) separate EA markets, the Commission would have no basis for denying Non-Nextel EA and Cellular-Architecture System licensees from participating in the award of 1.9 GHz Band spectrum.¹⁴⁸

Preferred therefore supports Nextel's proposed clarification to the *Report and Order* based upon its understanding that the FCC will award the 1.9 GHz Band spectrum on an EA market basis exclusively to either Nextel or Nextel Partners depending upon which company holds the 800 MHz Band spectrum to be vacated in a particular EA market.

¹⁴⁴ Using the \$1.70 per MHz/Pop valuation figure determined by the FCC in the *Report and Order*, this amount would be \$6.077 billion. Nextel, Nextel Partners and the Non-Nextel Control Group EA licensees therefore would receive a benefit of \$409.5 million. Presumably, these licensees would pay such amount to the U.S. Treasury as an anti-spectrum windfall payment.

¹⁴⁵ See Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Slide 9.

¹⁴⁶ See *Report and Order*, at ¶ 325 & n. 743.

¹⁴⁷ See Preferred March Ex Parte, at pp. 4, 37-38 and 41-42.

¹⁴⁸ Preferred has been informed by representatives of A.R.C., Inc. that the Wireless Telecommunications Bureau has adopted the latter position. According to A.R.C.'s representatives the Wireless Telecommunications Bureau's position is based upon the language in footnote 743 in the *Report and Order*.

C. Preferred's Improvements

In its March 2004 *ex parte* filing, Preferred proposed that the Commission explicitly recognize that a minimum of 5.5 MHz of 800 MHz Band EA- and Site-Licensed Spectrum needed to be moved and exchanged for 1.9 GHz Band spectrum.¹⁴⁹ In the one hundred eighteen (118) EA markets in which Nextel or Nextel Partners share General Category and Lower 80 EA-Licensed Spectrum with Non-Nextel EA licensees, such figure increases from 5.5 MHz to as much as 8-9 MHz. As noted above, under Preferred's Improvements the FCC would modify and move the General Category, Lower 80 EA- and Site-Licensed and BILT Site Channels according to type of license held rather than their construction status, type of system architecture deployed or identity of the licensee. As a result, the FCC clearly has authority under existing precedent to modify and move the 800 MHz licenses of a particular class of licensees to the 1.9 GHz Band on an EA market Clean and 1:1 basis.¹⁵⁰

With respect to the "excess" 1.9 GHz Band spectrum, the 1.9 GHz Band spectrum awarded in the one hundred seventy-five (175) EA markets, under Preferred's Improvements the FCC would sell such spectrum to members of the class of General Category and Lower 80 EA licensees and Cellular-Architecture System licensees that elect to

- (1) forego reimbursement of their own relocation costs; and
- (2) contribute funds toward payment of total 800 MHz Band relocation costs and the clearing of the 1.9 GHz Band spectrum.¹⁵¹

Preferred maintains that although the award of such spectrum would involve the issuance of an initial license, under existing precedent the FCC would have the authority to avoid mutual exclusivity and the otherwise mandatorily applicable competitive bidding

¹⁴⁹ See Preferred March Ex Parte, at pp. 7, 37-38 and 49-50.

¹⁵⁰ See *Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations*, MM Docket No. 85-41, Report and Order, RR 2d 1455 (1986)("Channel Exchange Order")(1988), *aff'd* *Rainbow Broadcasting v. FCC*, 949 F.2d 405 (D.C. Cir. 1991)("Rainbow Broadcasting"); *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and 1.6/2.4 GHz Bands*, Report and Order and Notice of Proposed Rulemaking, IB Docket No. 01-185, 18 FCC Rcd 1962, ¶ 225 & n. 591 ("*MSS/ATC Order*"); *Establishing Rules and Policies for the Use of Spectrum for Mobile Satellite Services in the Upper and Lower L-Band*, IB Docket No. 96-132, Report and Order, 17 FCC Rcd 2704, at ¶ 225 ("*MSS L-Band Order*"); *Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service*, ET Docket No. 97-99, Order, 12 FCC Rcd 4990 (1997), *recon. denied*, 13 FCC Rcd 15147 (1998)("DEMS Order") at ¶ 11.

¹⁵¹ See Preferred March Ex Parte, at pp. 7 and 49-50.

provisions of Section 309(j).¹⁵² Such approach clearly would comply with the Commission's statutory mandates to maintain regulatory parity among SMR licensees and to promote competition among them.¹⁵³

III. Funding

A. *Report and Order*

Under the Consensus Parties' Proposal Nextel promised to contribute up to \$850 million toward payment of total 800 MHz Band relocation costs. Nextel also promised to place \$100 million into an independent escrow account and securing the remaining \$750 million balance of such amount with an irrevocable letter of credit. Seeking to avoid a scenario in which Public Safety and other licensees' Site-Licensed Spectrum were partially relocated and Nextel's estimates of relocation costs proved unrealistically low leaving such licensees without the means of completing the relocation process, the Commission declined to cap Nextel's payment obligation at any amount.¹⁵⁴ Instead, the FCC required Nextel to pay all 800 MHz Band reconfiguration costs as defined in the *Report and Order*.¹⁵⁵ Moreover, the Commission required Nextel to irrevocably commit a minimum of \$2.5 billion to ensure completion of 800 MHz rebanding.¹⁵⁶

Under the FCC's approach Nextel and/or the issuing bank would select a Letter of Credit Trustee. Such Trustee is required to be independent and free of conflicts of interest. The Trustee would draw upon the Letter of Credit to fund the costs involved in the 800 MHz rebanding process and clearing the 1.9 GHz Band.¹⁵⁷ If, at any time during the 800 MHz rebanding process, the Transition Administrator determines that the Letter of Credit does not retain sufficient undrawn funds to ensure completion of such process, Nextel would be required to open an additional Letter of Credit. However, the Transition Administrator is instructed not to permit Nextel to reduce the aggregate secured by the Letter(s) of Credit below \$850 million.¹⁵⁸

B. Nextel's Requests for Clarification

In its *ex parte* presentation filed on September 21, 2004, Nextel requested a clarification that would allow it to substitute a standby letter of credit for the irrevocable

¹⁵² See Sections 316 and 309(j)(6)(E) of the Communications Act of 1934, as amended and the authorities cited in n. 147 *supra*.

¹⁵³ See Preferred Communication Systems, Inc., Ex Parte Presentation, April 23, 2004, at pp. 5-7; and Preferred March Ex Parte, at pp. 49-50.

¹⁵⁴ See *Report and Order*, at ¶ 29.

¹⁵⁵ See *id.*

¹⁵⁶ See *id.*, at ¶ 181.

¹⁵⁷ See *id.*, at ¶ 182.

¹⁵⁸ See *id.*, at ¶ 183.

letter of credit required by the Commission in the *Report and Order*.¹⁵⁹ In its *ex parte* presentation filed on September 23, 2004, Nextel requested the following clarifications of the *Report and Order* with respect to its obligation to provide a Letter of Credit:

- (1) provide multiple letters of credit to be issued by a number of financial institutions;
- (2) Nextel be allowed to pay 800 MHz rebanding costs directly as they are incurred during the course of the relocation process; and
- (3) if Nextel determined not to accept the *Report and Order*, it would not be required to perform its obligations set forth therein.¹⁶⁰

Preferred maintains that in reviewing Nextel's requests for clarification the Commission should seek to promote an 800 MHz rebanding payment process involving the least possibility for disputes and resulting delay. Under this standard, Nextel's requests appear reasonable and justifiable. However, if the FCC allows Nextel to pay 800 MHz relocation costs directly, Preferred would request that the Commission explicitly retain the Transition Administrator's role in determining which 800 MHz Band relocation costs are to be paid and in what amounts. Nextel's role under this approach would be to simply forward the payments approved by the Transition Administrator.

In its *ex parte* presentation filed on September 16, 2004, Nextel requested clarification that it receive credit in the financial reconciliation process described in paragraphs 329-330 of the *Report and Order* for the costs it incurs in adding base stations necessary to maintain its existing network capacity during the band reconfiguration process.¹⁶¹

Preferred believes that Nextel's request for clarification is reasonable and should be adopted. Preferred would note that Nextel inadvertently omitted to request such clarification on behalf of Nextel Partners. Preferred would support extending the credit Nextel would receive for such capital expenditures to those incurred by Nextel Partners. However, Preferred maintains that the Commission's amendment of its rules to allow 900 MHz Band licenses to initiate CMRS operations on their currently authorized spectrum or to assign their authorizations to others for CMRS use¹⁶² and the Transition Administrator's credit of Nextel's and Nextel Partners' capital expenditures incurred in adding base stations to maintain their respective existing operating systems' capacity should obviate the need to impose the *pro rata* distribution approach discussed above and in Appendix I attached hereto.

¹⁵⁹ Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Slide 9; *see also* Nextel Communications, Inc., Ex Parte Presentation, September 23, 2004; and Nextel Communications, Inc., Ex Parte Presentation, October 1, 2004.

¹⁶⁰ *See Report and Order*, at ¶ 87.

¹⁶¹ *See* Nextel Communications, Inc., Ex Parte Presentation, September 16, 2004, at p.3; and Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Slide 8.

¹⁶² *See* 47 C.F.R. § 90.621(f) and *Report and Order*, at ¶ 6.

C. Preferred's Improvements

One of the major legal and practical problems with the CTIA/Verizon Wireless Compromise Proposal was that it required Nextel to pay for 10 MHz of new 2.1 GHz band spectrum when it is purchasing an average of only 3.5-4.5 MHz of such spectrum.¹⁶³ As discussed above, in the FCC's reconsideration of the *Report and Order*, the balance of the 1.9 GHz band spectrum replaces the 800 MHz band Cellular Eligible Service Spectrum Nextel or Nextel Partners is vacating. Modification of already-existing 800 MHz band spectrum largely addresses Verizon Wireless' contention that the FCC lacks the legal authority to sell 1.9 GHz band spectrum to Nextel by a private sale outside of the competitive bidding provisions of Section 309(j). The problem, of course, is that if the Commission is selling less 1.9 GHz band spectrum, it cannot expect or ask Nextel or a Non-Nextel Control Group EA licensee to pay a considerable amount. This is particularly the case if Nextel and Nextel Partners vacate a considerable portion of their Upper 200 Channels' Spectrum in the one hundred eighteen (118) EA markets in which these licensees share General Category and Lower 80 EA-Licensed Spectrum with Non-Nextel EA licensees. As noted above, the capital expenditures to be incurred by Nextel and Nextel Partners for additional cell sites to maintain their respective operating systems' capacity should be counted toward Nextel's obligation to contribute a total of \$4.86 billion in value in exchange for its receipt of 10 MHz of 1.9 GHz Band spectrum in each of the one hundred seventy-five (175) EA markets. One of the major legal and practical problems with the Enhanced Consensus Parties' Proposal was that Nextel's promised contribution does not cover all of the reasonably anticipated 800 MHz relocation costs.

Preferred maintains that cellular licensees who benefit from reorganization of the 800 MHz Private Land Mobile Band should contribute funds to defray total 800 MHz band relocation costs. For example, cellular carriers operating in the A Frequency Block are converting the lower half of their respective spectrum from analog to digital. Such conversion necessarily will result in increased incidents of interference with Public safety and other licensees in the immediately adjacent 800 MHz Private Land Mobile Radio Band. As a result, such licensees would receive a considerable operating and financial benefit from the FCC's adoption of Preferred's Improvements. Moreover, these licensees and cellular carriers operating in the B Frequency Block have had the benefit of utilizing their respective spectrum for over twenty years without paying either for the initial issuance of their respective licenses or their several renewals. With the passage of the Omnibus Budget Reconciliation Act of 1993, which mandated that the FCC maintain regulatory parity among all CMRS licensees and the 1997 amendment to Section 309 of the Communications Act, which mandated the future allocation of commercial services spectrum by a competitive bidding procedure, Preferred contends that the FCC should now seek to impose license renewal fees on CMRS licenses previously awarded by comparative hearing or a lottery procedure.

¹⁶³ This problem is highlighted by Nextel's request for clarification with respect to the FCC's incorrect calculation of the value of Nextel's 800 MHz Band spectral contribution. See Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Slide 9.

As Preferred noted in its Ex Parte Comment filed on March 2, 2004, the probable realistic cost of the Consensus Parties' Proposal is approximately \$3.360 billion.¹⁶⁴ Given the relatively small amount of 1.9 GHz band spectrum that would be allocated under the Consensus Parties' Proposal, the WTB Draft Report and Order or Preferred Improvements outside of the movement of 800 MHz spectrum, Preferred believes that it is unrealistic to expect Nextel, Preferred and perhaps other 800 MHz General Category and Lower 80 EA licensees to pay this entire amount. Preferred therefore would suggest that the Commission consider imposing a fee of \$.15 MHz/Pop as a condition of granting a renewal of the cellular authorizations that originally were allocated pursuant to a comparative hearing, lottery procedure or full market settlement approximately twenty years ago and which have been renewed several times. Preferred estimates that such fee, which would be imposed upon the filing of each cellular license renewal application, would raise more than \$2.19 billion over the next five years.¹⁶⁵ Such monies could and arguably be used by the Commission to pay a portion of the total 800 MHz band relocation costs.

Moreover, if the FCC determines to afford adequate relocation cost funding a higher priority the providing additional 800 MHz band spectrum to Public Safety and Business and Industrial/Land Transportation licensees, it could allocate the 800 MHz band spectrum to be vacated within Channels 121-400 by a competitive public auction. Preferred estimates that an average of 4.5-4.7 MHz of 800 MHz band spectrum would be allocated in each of the one hundred seventy-five (175) EA markets. The Commission clearly would have the authority to require the winners of this auction to pay the relocation costs of the Public Safety and Business and Industrial/Land Transportation licensees presently holding spectrum within the Interleave Channels. Preferred estimates that the winners of such auction would be required to pay approximately \$686 million to relocate such Public Safety and Business and Industrial/Land Transportation licensees, or an average of \$.50 per MHz/Pop for the 800 MHz spectrum acquired in the auction.

Together with Nextel's (up to \$850 million with \$100 million secured by irrevocable letter of credit) and Preferred's (up to \$200 million) promised contributions and a renewal fee imposed upon cellular licensees, more than \$3.876 billion would become available over a five-year period to pay the total 800 MHz band relocation costs reasonably estimated at approximately \$3.360 billion.

¹⁶⁴ Preferred Communication Systems, Inc., March Ex Parte, at pp. 35-37 and **Exhibit K**.

¹⁶⁵ Under Sections 158 and 159 of the Communications Act, the FCC has authority to impose and collect the monies. However, the amount of application and regulatory fees are capped by statute. See *Verizon White Paper*, at p. 4. If necessary, Preferred would suggest that the Commission request that Congress amend one or more of these Sections or enact an entirely new section to empower the FCC to impose such fees as a condition of its renewing such cellular licenses and using the monies to defray a portion of the total 800 MHz band relocation costs and other purposes.

IV. Interference Standards and Administrative Issues

A. Report and Order

The Commission under took the following steps to minimize interference immediately with Public Safety and other non-cellular licensees' systems in the 800 MHz Band:

- (1) adopted a new, objective definition of "unacceptable interference" for purposes of this proceeding only, to determine when Public Safety and other Non-Cellular licensees are entitled to interference protection;¹⁶⁶
- (2) assigned strict responsibility for eliminating interference to the ESMR or cellular operator(s) implicated in the interference occurrence, and assigned responsibility to all involved commercial operators if unacceptable interference results from a combination of signals from multiple systems;¹⁶⁷
- (3) required ESMR and cellular licensees, on request, to notify Public Safety and Critical Infrastructure Industry ("CII") licensees prior to activating new or modified cells, and require Public Safety and CII licensees receiving such information to notify ESMR and cellular licensees of changes in system parameters.¹⁶⁸

The FCC also imposed milestones and deadlines so that the 800 MHz band relocation process would be completed within thirty-six (36) months of release of a Public Notice announcing the start date of reconfiguration in the first NPSPAC region. To ensure timely compliance, the Commission required Nextel to meet both an interim benchmark and a final benchmark. As an interim benchmark, within eighteen (18) months of release of a Public Notice announcing the start date of rebanding in the first NPSPAC region, Nextel must complete, and the Transition Administrator must certify that Nextel has completed, the relocation of Channels 1-120 for twenty (20) NPSPAC regions.¹⁶⁹ At thirty-six (36) months, Nextel must complete, and the Transition Administrator must certify, all relocation of 800 MHz incumbents required by the *Report and Order*.¹⁷⁰

B. Nextel Requests for Clarification

In its *ex parte* presentations filed in September 2004, Nextel requested clarification of the *Report and Order* of the following:

¹⁶⁶ See *Report and Order*, at ¶¶ 19, 102, 105-106, 109-110 and 107.

¹⁶⁷ See *id.*, at ¶ 130.

¹⁶⁸ See *id.*, at ¶¶ 124-127.

¹⁶⁹ See *id.*, at ¶ 28.

¹⁷⁰ See *id.*

- (1) *Report and Order's* interference protection standard achievable only after realignment—spectrum interleaving necessary to achieve this protection; FCC therefore should enforce transition period interference protection standard tailored to the interleaved spectrum environment that remains (both lower channels and NPSPAC) until rebanding completed in a Region;¹⁷¹
- (2) *Report and Order's* eighteen (18) month relocation milestone does not apply to Nextel and Southern;¹⁷²
- (3) milestones and deadlines for completing 800 MHz Band relocation should commence on the start date of band reconfiguration in the first NPSPAC Region;¹⁷³
- (4) *Report and Order* leaves rebanding sequence and details to Transition Administrator and incumbent licensees;¹⁷⁴
- (5) Nextel and incumbents may directly negotiate and implement relocation agreements unless either asks Transition Administrator to be intermediary;¹⁷⁵ and
- (6) refusal to negotiate or make realistic counter-offer constitutes bad faith under FCC rules;¹⁷⁶

Preferred maintains that the primary goal of the Commission should be to ensure the immediate implementation of technical standards and mitigation tactics that are designed to minimize unacceptable interference with Public Safety and CII systems in the 800 MHz Band. Preferred therefore opposes Nextel's requests for clarification that would weaken the interference protection standard the *Report and Order* would impose immediately and delay the commencement of the thirty-six (36) month reconfiguration milestone period.

¹⁷¹ Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Slide 7; and Nextel Communications, Inc., Ex Parte Presentation, September 28, 2004, at pp. 1-5.

¹⁷² Nextel Communications, Inc., Ex Parte Presentation, September 16, 2004, at p. 4; and Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Slide 4.

¹⁷³ Nextel Communications, Inc., Ex Parte Presentation, September 16, 2004, at p. 3; and Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Slide 4.

¹⁷⁴ Nextel Communications, Inc., Ex Parte Presentation, September 21, 2004, at Slide 5.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

CONCLUSION

The actual operation of the *Report and Order's* 800 MHz Band movement methodology in the twenty-eight (28) EA markets in which Nextel holds all of the EA-Licensed Spectrum provides the Commission a road map both as to how to reorganize the 800 MHz band and allocate the 1.9 GHz band spectrum.¹⁷⁷ Seeking to provide 1.9 GHz band spectrum exclusively to Nextel in the EA markets in which it holds no 800 MHz band spectrum or shares EA-Licensed Spectrum with Non-NCG EA licensees through a hybrid part modification of 4.5 MHz of Nextel's 800 MHz band spectrum and part private sale clearly results in a violation of the competitive bidding provisions of Section 309(j) as well as the FCC's statutory mandates to maintain regulatory parity and promote diversity of license ownership and competition among commercial SMR operators. Given the 800 MHz band's spectrum realities, adoption of a rebanding approach that separates EA-Licensed Spectrum from its underlying Site-Licensed Spectrum, Preferred believes that such separation is probably required if the Commission is seeking contributions from Nextel and other EA licensees to defray total 800 MHz band relocation costs.¹⁷⁸ requires the FCC to adopt Preferred's Improvements.¹⁷⁹

Ignoring the 800 MHz band spectrum realities in the one hundred forty-seven (147) EA markets in which Nextel does not hold all of the EA-Licensed Spectrum and Business and Industrial/Land Transportation Channels and adopting a rebanding approach exclusively allocating 1.9 GHz band spectrum will lead to regulatory and judicial challenges and further delay in resolving the interference experienced by public safety and other licensees in the 800 MHz band. Given the importance of the interference issue, Preferred believes that the FCC should get this right the first time and not adopt an approach unlikely to withstand judicial scrutiny.

If Nextel determines that it cannot contribute funds to defray total 800 MHz band relocation costs and forego reimbursement of its own relocation costs if the FCC adopts Preferred's Improvements, Preferred would strongly recommend that the Commission pursue the alternative sources of funding set forth above to replace Nextel's promised contribution.

¹⁷⁷ Preferred believes that such separation is probably required if the Commission is seeking contributions from Nextel and other EA licensees to defray total 800 MHz band relocation costs.

¹⁷⁸ See Preferred Communication Systems, Inc., March Ex Parte, at pp. 45-51.

¹⁷⁹ See Nextel Communications, Inc., Ex Parte Presentation, June 14, 2003, at p. 5 ("Obviously, being forced to cease operations, or deploy hundreds of millions of dollars worth of added infrastructure in these markets alone was not part of a balancing of interests sought by the Consensus Parties in proposing a comprehensive realignment of the 800 MHz band. It would be impossible for Nextel to support 800 MHz realignment under these circumstances.") Of course, if Nextel were to agree to Preferred's Improvements, except in a relatively few EA markets Nextel would not vacate a considerable number of its Upper 200 Channels. It therefore would neither experience major disruption to its current operations nor considerable additional costs.